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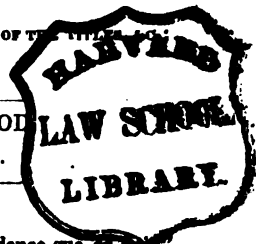
AN
ANALYTICAL AND PRACTICAL
SYNOPSIS
OF ALL THE
CASES ARGUED AND REVERSED
IN LAW AND EQUITY,
IN THE
COURT FOR THE CORRECTION OF ERRORS

STATE OF NEW YORK,

FROM 1789 TO 1847;

WITH THE NAMES OF THE CASES AND A TABLE OF THE TITLES.

BY RALPH LOCKWOOD
COUNSELLOR AT LAW.



"On ne peut pas plus se passer de Jurisprudence que de Logique."
[PORTALIS]

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TO
THE HON. SAMUEL JONES,
ONE OF THE JUDGES OF THE COURT OF APPEALS,
LATE CHANCELLOR OF THE STATE OF NEW YORK,
AND SINCE CHIEF JUSTICE OF THE SUPERIOR COURT
OF THE
CITY OF NEW YORK;
AS A TOKEN OF RESPECT FOR HIS ABILITY AND INDEPENDENCE
AS A JUDGE,
HIS PROFOUND LEARNING AND SCIENCE AS A JURIST,
AND HIS ELEVATED PERSONAL QUALITIES IN PRIVATE
AS WELL AS PUBLIC LIFE,
THIS WORK
IS, BY HIS KIND PERMISSION,
MOST RESPECTFULLY INSCRIBED.

BY

THE AUTHOR.

ADVERTISEMENT.

THE following work is intended as a *Synopsis* of all the decisions of our late Court of Errors, which have from time to time, reversed those of the Supreme Court and of the Court of Chancery, from the commencement of our State Reports until the Court of Appeals, under the Constitution of 1846, was substituted in its place. A comparative view of the grounds of decision in each case in the court below, and of reversal in the Court of Errors is given ; with a brief statement of the facts and circumstances whenever it appeared necessary to a clear comprehension of the principles of the decision, or to elucidate their application. It has been attempted to present a condensed view of the whole jurisprudence embodied in the *Reversals* of our late Court of Final Appeal. The substance of the decisions of the respective courts, has been, whenever practicable, given in the language of the judges' opinions.

The cases reversed by the Court of Errors, during the whole period of its existence, as reported in that court and in the courts below, and scattered through NINETY volumes of reports, are here collected into one compend. If no other merit be awarded to this labor, it is hoped that it will at least deserve the credit of having furnished a convenient clue to the cases themselves, and a correct index to the subjects of adjudication.

✍ The occasional notes appended and observations hazarded by the author, are indicated by the sign prefixed to this sentence.

CHANCELLORS.

OF THE STATE OF NEW YORK,

FROM 1777 TO 1848.

Robert R. Livingston,	appointed	<i>October 17, 1777</i>
John Lansing, Jun.		<i>October 28, 1801</i>
James Kent,		<i>February 25, 1814</i>
Nathan Sanford,		<i>January 27, 1823</i>
Samuel Jones,		<i>January 27, 1826</i>
Reuben H. Walworth,		<i>April 19, 1828</i>

The term of office of Ch. Walworth will expire by the limitation in the new constitution on the first day of July, 1848.

JUDGES OF THE SUPREME COURT,

FROM 1777 TO 1848.

Chief Justices.

John Jay,	appointed	<i>October 17, 1777</i>
Richard Morris,		<i>October 28, 1779</i>
Robert Yates,		<i>September 28, 1780</i>
John Lansing, Jun.		<i>February 15, 1798</i>
Morgan Lewis,		<i>October 28, 1801</i>
James Kent,		<i>July 2, 1804</i>
Smith Thompson,		<i>February 25, 1814</i>
Ambrose Spencer,		<i>February 9, 1819</i>

Under the constitution of 1821 which went into operation on the last day of December, 1822.

John Savage,	appointed	<i>January 29, 1823</i>
--------------	-----------	-------------------------

Samuel Nelson, (vice Savage C. J. resigned,) *Oct. 29, 1836*
 Greene C. Bronson, (vice Nelson C. J. re-
 signed,) *March 5, 1845*
 Samuel Beardsley, (vice Bronson C. J. re-
 signed on being elected Judge of Court of
 Appeals.) *March, 5 1846*

The term of Ch. J. Beardsley and his associate justices expires by
 constitutional limitation, on the 1st day of July, 1848.

PUISNE JUDGES UNDER THE CONSTITUTION

OF 1777.

Robert Yates,	}	appointed	<i>October 17, 1777</i>
John Sloss Hobart,			
John Lansing, Jun.			<i>September 28, 1790</i>
Morgan Lewis,			<i>December 21, 1792</i>
Egbert Benson,			<i>January 29, 1794</i>
James Kent,			<i>February 6, 1798</i>
John Cozine,			<i>August 9, 1798</i>
Jacob Radcliff,			<i>December 27, 1798</i>
Brockholst Livingston,	}		<i>January 8, 1802</i>
Smith Thompson,			
Ambrose Spencer,			<i>February 3, 1804</i>
Daniel D. Tompkins,			<i>July 2, 1804</i>
William W. Van Ness,			<i>June 9, 1807</i>
Joseph C. Yates,			<i>February 8, 1808</i>
Jonas Platt,			<i>February 25, 1814</i>
John Woodworth,			<i>March 27, 1819</i>

(By the ninth article of the new constitution, which went into operation on the last day of December, 1822, the commissions of all persons holding civil offices were to expire on that day; but officers then in commission might continue to hold their offices until new appointments were made. Chief Justice Spencer, Judge Platt and Judge Woodworth the only Judges remaining on the Bench of the Supreme Court continued to hold their offices until the 29th

of January, 1823, when John Savage, Esq. was appointed *Chief Justice* and Jacob Sutherland, Esq. a *Judge*. Judge Woodworth received a new commission on the 6th of February following; the new constitution having limited the number of judges to three. Chancellor Kent remained in office until the 31st of July, 1823, when he attained the age of sixty years, the period limited by the 5th Article of the constitution for the tenure of the office, and that of a judge of the Supreme Court. Nathan Sanford, Esq. was appointed Chancellor January 27, 1823; but did not take the oath nor enter on the duties of his office until the 1st of August following.)

PUISNE JUDGES UNDER THE CONSTITUTION
OF 1821.

Jacob Sutherland,	appointed	<i>January 29, 1823</i>
John Woodworth,		<i>February, 6, 1823</i>
William L. Marcy, (vice Woodworth J. resigned,)		<i>January 21, 1829</i>
Samuel Nelson, (vice Marcy J. resigned,)		<i>February 21, 1831</i>
Greene C. Bronson, (vice Sutherland J.)		<i>October 21, 1835</i>
Esek Cowen, (vice Nelson J. made C. J.)		<i>September 21, 1836</i>
Samuel Beardsley (vice Cowen J. deceased)		<i>February 20, 1844</i>
Freeborn G. Jewett, (vice Nelson C. J. resigned on being appointed a Justice of the Supreme Court of the U. S.)		<i>March 20, 1845</i>
John McKissock,	}	<i>July, 1847</i>
Frederick Whittlesey,		
Vice Bronson C. J. and Jewett J. elected judges of the Court of Appeals under the new constitution at the first election in June, 1847.		

☞ The Hon. John Woodworth of Albany is the only survivor of the Justices of the Supreme Court under the constitution of 1777; Justices Sutherland and Cowen, the only deceased members of the Supreme Court under that of 1821.

On the adoption of the present constitution, the legislature which convened in January, 1847, provided for the organization of the Court of Appeals, and for transferring to it the business pending in the Court for the Correction of Errors according to the constitutional provision, and thereupon the court ceased to exist. Doubts having arisen whether it could exercise its judicial functions after 1st of January, 1847, no further proceedings, in the way of hearing and deciding causes then pending, took place before it.

JUDGES OF THE COURT OF APPEALS UNDER

THE CONSTITUTION OF 1846.

Elected by general state ticket.

Freeborn G. Jewett, of Onondaga,	Chief Judge
Greene C. Bronson, of Albany,	Associate Judge
Addison Gardner, of Monroe,	do
Charles H. Ruggles, of Dutchess,	do

Judges of the Court of Appeals *ex officio*, having drawn the term of two years.

Samuel Jones, of New York,	1st District
William B. Wright, of Sullivan,	3d District
Charles Gray, of Herkimer,	5th District
Thomas A. Johnson, of Steuben,	7th District

JUSTICES OF THE SUPREME COURT OF THE
STATE OF NEW YORK.

First Judicial District.

Samuel Jones,
John W. Edmonds,
Elisha P. Hurlbut,
Henry P. Edwards.

Fifth Judicial District.

Philo Gridley,
William F. Allen,
Daniel Pratt,
Charles Gray.

Second Judicial District.

Seward Barculo,
Selah B. Strong,
William T. McCoun,
Nathan B. Morse,

Sixth Judicial District.

Hiram Gray,
Eben B. Morehouse,
Charles Mason,
William H. Shankland,

Third Judicial District.

Amasa J. Parker,
William B. Wright,
Ira Harris,
Malbone Watson,

Seventh Judicial District.

Samuel L. Selden,
John Maynard,
Henry Welles,
Thomas A. Johnson,

Fourth Judicial District.

John Willard,
Daniel Cady,
Augustus C. Hand,
Alonzo C. Paige.

Eighth Judicial District.

James Mullet,
Seth E. Sill,
Richard P. Marvin,
James G. Hoyt.

ABBREVIATIONS USED IN THIS SYNOPSIS.

- J. C. Reports of Cases adjudged in the Supreme Court of Judicature of the state of New York, from January term, 1799, to January term, 1803 ; both inclusive ; together with the cases determined in the Court for the Correction of Errors, during that period. By William Johnson, counsellor at law. In three volumes.
- C. R. Reports of Cases argued and determined in the Supreme Court of the state of New York. By George Caines, counsellor at law. In three volumes. Commencing in May term, 1803, and ending in November term, 1805.
- C. C. E. Cases argued and determined in the Court for the Trial of impeachments, and the Correction of Errors, in the state of New York. By George Caines. In two volumes. These reports commence in February, 1804, and end in February, 1805 ; but the reporter has added several cases decided in that court, and in the Supreme Court, prior to that time.
- J. R. Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the state of New York. By William Johnson, counsellor at law. In twenty volumes. Commencing in February term, 1806, and ending in January term, 1823.
- J. C. R. Reports of Cases adjudged in the Court of Chancery of New York. By William Johnson, counsel-

lor at law. In seven volumes. Commencing March 3, 1814, and ending July 29th, 1823.

Cowen. Reports of Cases in the Supreme Court of Judicature, and in the Court for the Correction of Errors of the state of New York. By Essek Cowen, counsellor at law. In nine volumes. Commencing in May term, 1823, and ending in January term, 1829.

Hopkins. Reports of Cases in the Court of Chancery of the state of New York, during the time of Chancellor Sandford. By Samuel L. Hopkins, counsellor at law. One vol. Commencing April, 1823, and ending in 1825.

Wend. R. Reports of Cases adjudged in the Supreme Court and Court of Errors of the state of New York. By John L. Wendell. Twenty-six volumes. Commencing in May term, 1828, and ending in 1841.

Hill R. Reports of Cases adjudged in the Supreme Court and Court of Errors of the state of New York. By Nicholas Hill, counsellor at law. Seven volumes. Commencing in January term, 1841, and ending in 1846.

Denio. Reports of Cases adjudged in the Supreme Court and Court for the Correction of Errors of the state of New York. By H. Denio, counsellor at law. Commencing May term, 1845, and still continued.

Paige. Reports of Cases adjudged in the Court of Chancery during the time of Chancellor Walworth. By John Keyes Paige, counsellor at law. Ten volumes. Commencing in 1828, and ending in 1846.

In all, ninety volumes.

S. C. Same case.

S. P. Same point.

C. P. Court of Common Pleas.

Ch. Chancellor.

Ch. J. Chief Justice.

J. Justice.

R. L. The statutes as revised by Messrs. Van Ness and
Woodworth, in 1813, "Revised Laws."

R. S. Revised Statutes of 1830, as revised by Messrs. John
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F

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H

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Jackson ex dem. Webb v. Robert's exrs., 11 Wend. 422.	do.
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K

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L

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N

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R

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S

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T

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U

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V

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W

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Y

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K

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M

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Mc

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N

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P

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R

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S

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V

Varick's Ex'rs v. Briggs.	Decree affirmed.	22 Wend. 543
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Van Hook v. Whitlock.	Decree affirmed.	26 Wend. 43
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W

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ERRATA.

(The following typographical errors should be noticed and corrected, as they change the intended meaning of the sentences in which they occur. It is believed that the remainder, if any, are too trifling to need particular notice.)

In page 11, line 16 from the top of the page, (in the case of *Bromagham v. Clapp*.) for "issue to the courts, &c." read "issue to the country."
Page 111, line 33, for "authority confirmed," read "authority conferred."
Page 170, line 5 from the bottom of the page, for "issue therefore joined," read "issue thereupon joined."
Page 336, line 22, for "denied the motion," read "decided the motion."
Page 465, line 24, for "benefits from the land," read "benefits from the canal."

TOTAL NUMBER OF CASES REVERSED, MODIFIED AND AFFIRMED FROM 1799 to 1847.

Number of cases reversed,	.	.	.	.	.	240
" modified,	.	.	.	.	.	18
" affirmed, to 1835,	.	.	.	.	.	199
Judgments affirmed from 1834 to 1847,	.	.	.	.	.	124
Decrees, " "	.	.	.	.	.	49

INTRODUCTION.

WHEN the final appellate jurisdiction, in law and equity, of our late Court for the Correction of Errors is considered, it becomes a matter of astonishment that no attempt has hitherto been made to present an abstract of those of its decisions by which the judgments of the Supreme Court and the decrees of the Court of Chancery have, from time to time, been reversed. By the force of its paramount jurisdiction, those decisions become, in effect, a part of the settled law of the land. Where the court has, on review, merely *affirmed* those of the courts below, such a reproduction would be little more than a repetition. But where, upon opposite views, either of the principles of law or of their application, it has annulled the decisions of the courts below and established new rules of jurisprudence, the change becomes of the highest interest to the judges, jurists, and lawyers who come after. To ascertain what has been reversed and what established in its place, it is necessary to investigate and collate the grounds of adjudication in both courts; to compare the principles on which each proceeded, and fix the limits and effect of the reversal. It is quite obvious that any plan of a synopsis of the jurisprudence of the court of dernier resort would be lame and incomplete which did not present this parallel or rather contrast of the opposing decisions. The conclusions of both courts are indispensable to the accurate comprehension of the principles and extent of the reversal.

The first endeavor, therefore, of this treatise has been to present, in the fewest words, as clear and definite a view as possible of the principles of law and of their application as asserted in the courts below, and of the opposite grounds on which the law has been settled in the court of final review. Another aim has been to incite a spirit of free inquiry into their relative legal merits; a spirit which, though of late grown somewhat languid, must be cherished and constantly exercised by all members of the profession who would not degenerate into what are known by the common but significant appellation of *case lawyers*. By this is meant a class with whom every case, wherever, whenever, and however decided, seems to be equally regarded; who do not stop to canvass the grounds of decision, or to compare them with cases of opposite character,

but appear to consider that questions of law, ever so intricate and important, are to be decided by the number of cases hunted up on either side ; upon the same principle that motions for change of venue are disposed of, the number of witnesses which the respective parties can muster in their affidavits. That rule would certainly be found a strange criterion by which to decide the merits of a cause ; but not a whit more arbitrary or absurd than it is in many instances to decide upon the numerical force of authorities. The weight of authorities is one thing, the number quite another. Quality and quantity are there as in many other matters, strangely contrasted. If these pages shall tend to foster the habit of liberal investigation, and to facilitate the analysis and comparison of the important decisions of which something more than a mere digest is here attempted to be given, the labor of the writer will not have been entirely in vain.

Another motive has also encouraged the prosecution of this task. An animating confidence has been entertained that a fair comparative view of the decisions thus given would vindicate the legal justness of most of the reversals in the Court of Errors. In a great majority of the cases, it is believed that the court has really merited its title by the correction of errors into which the courts below have fallen ; sometimes from haste or inadvertence, sometimes from yielding to weak and insufficient authorities. Such, some English, others American, have often weighed unduly upon them ; until the court of dernier resort has come to their relief and disembarassed our jurisprudence of a long accumulation of ill-conditioned, worthless reported cases. In others, it has applied decisions of clear and undoubted authority to the facts and circumstances of the case before it, with a justness of discrimination and, at the same time, a liberal spirit of equity, which have placed the determinations of the courts below clearly in the wrong, both upon principle and precedent.

Thus much in general may be justly claimed for the decisions of that court, without pretending to affirm their uniform correctness. To attempt to establish this assertion by reference to particular cases would have greatly exceeded the privilege of an epitomist, to say nothing of its boundless presumption. This general claim is neither rash nor presumptuous ; whether well or ill-founded, it is respectfully but confidently submitted : let the arbitrament of professional investigation decide.

The constitution and organization of the late Court of Errors have been made the theme of alternate commendation and dispraise, in connection with the intrinsic weight and authority of its adjudications. This question is best answered, perhaps, by an appeal to the decisions themselves. Let them be examined and compared with those of the courts below, before any *a priori* sentence is pronounced upon the constitution of the court itself. For however theory may enlarge upon faults of organization, it is always a strong argument, if not a triumphant one, to show that the system has *worked well* ; that it has enjoyed the general respect and confidence of the profession and of the people of the state.

And it is a singular fact, that although the judiciary committee in the convention for revising our late constitution were nearly if not quite unanimous in their report to abolish the Court of Errors as then constituted, yet no one member of that committee or of the convention expressed any sentiment towards that court except of respect and confidence. Mr. Marvin, the delegate from the county of Chataque, now the Hon. RICHARD P. MARVIN, one of the justices of the Supreme Court, when the question of substituting our present Court of Appeals in the place of the Court of Errors was under discussion, although he was not in favor of retaining the old court, rendered the following homage of respect to its past career ; a homage, as just in sentiment, as it was forcible and manly in utterance.

"The Court of Appeals, upon the plan of the committee, did not meet his views of what a court of last resort in the great state of New York should be. It had been resolved nearly if not quite unanimously to abolish the Court of Errors as now constituted, upon the ground that a large portion of it was a branch of the legislature, and also that it was too large a body for a court. It was, however, only an act of justice to say that that court had commanded the respect and confidence of the people of this state and of the other states of the Union. And its exposition of the great and enlightened principles of the law, relieved from a too narrow and technical interpretation, have shed lustre upon the court and have ensured to the lasting benefit of the people, and of our system of jurisprudence."—*Debates in the Convention of 1846, (Atlas ed.) p. 596.*

This is no exaggerated eulogy, no extorted commendation. It was well merited and worthily bestowed.

It might, however, be admitted that the original plan of organization of the court was somewhat faulty in uniting legislative and judicial functions in the same body, without acknowledging that its efficiency had been in the slightest degree impaired by that theoretical defect. But a glance at its history will show that when it was erected, it was no time to descant upon nice theories of government. When the bold and patriotic convention which formed the constitution of 1777 met, they assembled amidst the troubles and turmoil of what was then a rebellion ; whether it would ever become a revolution was yet a dark and doubtful problem. With the dangers and perplexities of a struggle for national existence in full view, they proceeded calmly and wisely to lay the foundations of the great fabric of political government and civil liberty, which, with slight alterations and amendments, has since proved the citadel of our rights and prosperity. There was in that brave band of notables not one who talked or thought of yielding up to the new government about to be created, one jot of his rights as a freeman born ; no idea of making the perils by which the state was surrounded, the pretext for the appointment of a dictator, or even the temporary ascendancy of the military power. Nothing could induce the insertion of one article or clause inconsistent with the most liberal and enlightened principles of political and civil liberty. Viewed in that light, the constitution of the state of New York

of 1777, will be her chart of liberty as long as the proud Empire State to which it gave an organized and stable political existence shall endure, breathing the same spirit of rational liberty which that constitution for seventy years, has been silently and invisibly inspiring in her people.

When that convention proceeded to organize a judiciary system, it must be noted that the Supreme Court was the tribunal of final appeal. The executive council, generally mere creatures of the governor, in form exercised a legislative but no judicial authority. When, therefore, the convention determined to have a higher court of appeal than the Supreme Court, it became a most important question where that appellate jurisdiction should be placed. As they had already resolved that the legislative power should be vested in an *Assembly* of seventy representatives, and a *Senate* of twenty-four senators, to be chosen by the people, what so natural as to confer that jurisdiction upon the new Senate? The importance and dignity of the office of SENATOR, then a new word in the political vocabulary of the state, it was doubtless supposed would offer a prize to and secure the election of the most competent citizens ambitious of public life. No doubt, also, it was further calculated and foreseen that if these high judicial functions were superadded to the legislative duties of the Senate, the senators would be selected with a view to their qualifications for the former as well as the latter. The number of able lawyers who would be chosen, it was probably thought, would be sufficient, along with the judges of the Supreme Court and the Chancellor, to uphold and maintain the principles of that system of law and equity jurisprudence which was at the same time declared to be the law of the state. Was this calculation so unreasonable? So far from that, has not the history of the court since proved that the most distinguished statesmen and lawyers have there generally been found sitting side by side with the less learned but not unfrequently equally able and clear-headed merchant and mechanic, or the independent tiller of the soil? At the head of these all were the able and learned judges of the two highest courts to take part in the discussions and to give their voices in the decision. It were almost invidious to particularize. But the names of Senators Dewitt Clinton, Ambrose Spencer, Thomas R. Gold, among the dead, who were in their turn, active members of the Court of Errors, ought not to be passed in silence. Among the living, it may suffice to point to one who having enjoyed the highest civic honor his country could bestow, is now enjoying in the evening of his days, the pleasures of retirement and the respect of the state and nation, to whose service so much of his life has been devoted. It may well be claimed then, that this court has not been composed of and certainly not swayed by incompetent men; we may boldly, therefore, claim for it all the praise that the extract we have cited above awards to the court; "its expositions of the real and enlightened principles of the law, relieved from a too narrow and technical interpretation, have shed lustre upon the court, and have ensured to the lasting benefit of the people and of our system of jurisprudence."

The constitution of 1821, was in all its leading features but a copy of that of 1777. The convention which formed it enjoyed all the fruits of an experience of forty-five years under its operation. The same fruits had also been gathered from the experience under our national constitution and those of our sister states. And it is most wonderful to those at least who know the strong spirit of innovation that was manifested in many quarters, out of, as well as in the convention, how that glorious old constitution of 1777 came out of the fiery ordeal it had to undergo, entirely uninjured, and in some respects improved. No proposition to abolish the Court of Errors appears to have been made; and the resolution offered by Gen. Root, that the court should be composed of the president of the Senate and the senators alone, found no favor in the convention. It was lost by a vote of 73 to 36 against it.

In the course of the debate on the report of the judiciary committee, several delegates expressed their views in regard to the Court of Errors. We take leave to present a few extracts from the debates upon that part of the report.

Mr. Van Buren said: "It had been proposed, that we should roll from its bed the corner stone of our judiciary, which had been planted by the hands of our fathers, and which was the chief support of the structure which was reared upon it, as a basis. We have been urged to commit to the winds a system which had justly been considered the proudest pillar in our political fabric, and had been a subject of admiration in all parts of the country. He spoke of the proposition to exclude from the Court of Errors the Chancellor and judges. He deprecated such an alteration. It would never meet with the approbation of the citizens of this state. The greatest excellence in the constitution of that court consisted in the union of the judiciary and the Senate; men of plain understanding, with men versed in the science of jurisprudence."—Report of the proceedings of the Convention of 1821, p. 517.

"*Mr. Nathan Sanford*, desired that the court for the trial of impeachments and the correction of errors should remain as it was; and that the judges of the Supreme Court and the Chancellor should continue to be members of that court."—p. 517.

Gen. Root, in speaking in support of his amendment, said that "the gentleman from Otsego (*Mr. Van Buren*) had called the Court of Errors the chief corner stone, the rock upon which our judiciary system rested; and we had been warned against rolling this rock from its bed and committing it to the winds. If this rock were so light as to be lifted by every legislative puff, let it go—it could not be worth preserving."

"It was necessary," *Mr. R.* contended; "that we should have some tribunal to protect the people against judicial refinement. It was an error into which lawyers and judges were apt to fall, to adopt metaphysical rules and technical niceties. Was there ever any advantage experienced from metaphysical law? Or has the system of theology been advanced by metaphysical refinement? He wished to have a body of men to constitute that court, who might restore the law to the standard

of common sense. He had heard many high encomiums upon the courts of law. He should be glad to hear some upon the court of the people ; the court of dernier resort. He believed it deserved them. They had overruled many cases, at the determination of which in the courts of law common sense revolted."—p. 519.

Mr. *Ogden Edwards*, of New York, said in relation to this proposition of Gen. Root, to exclude the Chancellor and judges from the Court of Errors : " Another proposition is to take from the Supreme Court of Errors the Judges and Chancellor, leaving the whole duties of that court in the hands of men ignorant of the law. There would be as much propriety in this, as to leave to a board of lawyers to decide upon the health of a man, after the opinion of the wisest physicians had been obtained." —p. 523.

Mr. *Samuel Young*, delegate from Saratoga, " was not disposed to disturb the present organization of the Court of Errors ; he did not believe it would be improved by adding a number more of judges ; and indeed he believed there had not been much complaint of the decisions in that court, and they had been as much respected in other states, as the decisions of any other Court of Error."

The convention of 1846 presents a far different spectacle. A general reform was loudly demanded, in certain quarters, of our whole judiciary system ; the specific improvements appear to have been a secondary consideration. And it is doubtful whether any considerable portion of the people of the state had demanded any one in particular of the extensive innovations which the convention finally embodied in the constitution of 1846. We have already seen how nearly, if not quite unanimous were the judicial committee in the resolution to abolish the Court of Errors. It is true that the union of legislative and judicial authority in that body was not in strict accordance with that theoretical separation of the different departments of our government, which is now considered almost indispensable. Perhaps the change may contribute, as the avowed motive of it was, to a speedier dispatch of business. The calendar of the Court of Errors was fast accumulating, and they were in danger of being embarrassed by the increase ; yet the complaints were few of delays of justice in that court, compared with the loud and angry denunciations of the tardiness of other tribunals. There may have been enough, however, in the position of the Court of Errors, to justify apprehensions for the future. But the past remains of record, to speak for itself. To that we can point and boldly challenge a comparison with any, nay the highest court of the Union. In the Court of Errors, causes were more fully and thoroughly discussed than in any other court in our state. Its members manifested a due sense of the high responsibility resting upon them as the court of last appeal ; and as the decisions were not only to settle the rights of parties for ever, but principles of law also of the greatest importance, they heard with patience and dignity, and decided with caution and deliberation. Fortunately for our jurisprudence, their decisions have been preserved,

though dispersed through so many volumes ; and it is in some degree from that dispersion, that their intrinsic importance and authority do not appear to have been fully appreciated. Lord Campbell, in his *Lives of the Lord Chancellors*, (life of Lord Loughborough, vol. 6. p. 251,) mentions it as a curious fact that even in that Lord Chancellor's time, "although there were then published regular periodical reports of the cases determined in all the courts of Westminster Hall, the decisions of the court of dernier resort were still neglected, and it is wonderful to observe how little they have contributed to the formation of our civil code, whereas in most other countries the decisions of the court from which an appeal lies are rarely cited as authority."

That the Court of Errors may not, from its composition, have been sometimes betrayed into relaxing some well settled principle of law, from the hardship of a particular case, it is not intended to affirm. But nothing in the constitution of the court, or in the character of the judicial powers conferred on it, gave it any more right to dispense with such settled rules of law than any other court in the state possesses. The language therefore, which was held by Senator Spencer, (John C.) in *Dyett v. Pendleton*, on this subject, can not be considered as just. He would have the lay senators believe that the framers of the constitution intended "when the court of last resort was declared to consist of the Senators with the Chancellor and Judges, that there should be collected there a *body of sound, practical common sense*, which would not overthrow law, but which would apply the principles and the reasons of the law, according to the *justice of each case*, without regard to the *technical refinements and arbitrary and fictitious rules*, which will always grow upon professional men ; and herein I conceive consists the excellence of the court." This is a claim for that court of a prerogative to make law for *each particular case* according to what Mr. Senator Spencer is pleased to call its *justice*. It is true, this language if restricted to the proper meaning of the word *justice*, is equally applicable to the Supreme Court and the Court of Chancery ; for it is as much their duty and prerogative to decide upon the *justice* of a cause, "*without regard to technical refinements and arbitrary and fictitious rules*," as it is of the Court of Errors. There is no such different power of administering law and justice, given or intended to be given to the "*practical common sense of the court*," as Senator Spencer has here asserted. They are as much bound by the *technical* rules of law, if they are clear and well settled, as any other court. As to the "*arbitrary and fictitious rules*," alluded to by the senator, it is difficult to guess at his exact meaning. But a dispensing power like that he there claimed, would be an *arbitrary* rule which is easily understood ; a "*fictitious rule*" of law, is something that requires explanation. What aggravates the blame attached to such a doctrine, or of what is liable to be so understood, and coming from so distinguished a lawyer, is the fact which he immediately after admits, that there was "no necessity in that case to establish the law of a new case, but that it was already estab-

lished." It is fortunate for our jurisprudence, that no case is to be found in which those members of the Court of Errors here described, have separated themselves from the law members of the court, and attempted to erect a system of jurisprudence upon the basis of "every man his own lawyer." Their practical good sense, no less than their conscious inability and modesty have prevented their listening to such seductive invitations.

That in the multiplicity of conflicting decisions cited and discussed in that court, it has paid more respect to principle than to precedent, might be very safely admitted without impairing the value of their decisions in the slightest degree. The trite old maxims of "*stare decisis—stare super antiquas vias,*" &c., are applicable only in cases where the old decisions are all one way, and an attempt is made to overturn them as being in violation of clear principles of law. If the principle in question be an unimportant one as to its equity and justice, then *stare decisis* is well applied. But if it be inequitable and unjust in itself, then it should give way to *stare principiis*. In fact, this view has, after all, been practically acted upon by the judges in Great Britain and our own country from the beginning. Witness Professor Greenleaf's collection of some *three thousand* cases, "*overruled, denied and doubted.*"

But when decisions directly contrary, which baffle all attempts at reconciliation, are presented, how can any court decide between them except by recourse to principles? In such cases, it is impossible to ascertain their relative weight and value except by comparing each with the principles of law well established and admitted as the basis of reasoning. Whichever of the cases will not bear the test, must be rejected of course, and the other adopted. This is not to make or overturn law. It is but following the famous injunction of Justinian to a judge or arbiter, not to regard precedents when they should be found not well decided, "*quas non rite judicatas putaverit,*" "for, if not well decided, it ought not to force other judges into the same fault, so that they may administer justice not by precedents, but by the laws; *cum non exemplis, sed legibus judicandum sit.*" Cod. L. 13, *de sent. et intert.* This is the principle professedly adhered to by the civil law tribunals in Europe, and practically adopted per force, in England and this country.

The decisions of our Court of Errors, reversing those below, present one remarkable feature. Of all the two hundred and forty cases here collated, it will be found that scarcely ten have been reversed for mere technical defects of pleading, and not one for any slip in mere practice. The value of these decisions is not, therefore, in the slightest degree impaired by the new "Code of Procedure." Neither can the great principles of law and equity they have settled, be displaced by our Civil Code when it shall be completed. They must form part of its foundations, and unless that "faultless monster which the world ne'er saw," a code that needs no interpretation, should be produced, they will prove a necessary guide to the application of all the principles incorporated in it, which shall be founded on those decisions.

In a few instances, where the Court of Errors has reversed the decision of the courts below upon what appeared to be wholly insufficient grounds, I have ventured to criticise the opinions of those eminent judges and senators who acted as organs of the court. It were quite needless to protest that I have intended to review them with all the courtesy, respect, and deference due to their superior learning, talents, and discrimination. If in any of those criticisms upon judicial or senatorial opinions, I have exercised the privilege of discussion in too free and unguarded a manner, I must claim that indulgence which is accorded by the courts to the over-earnestness of forensic debate. If I have fallen into that error, it has proceeded only from the warmth inspired by conviction. As the fault, if committed, has been entirely an unconscious one; it is at all events, entitled to the full benefit of that excuse.

AN
ANALYTICAL AND PRACTICAL
SYNOPSIS OF CASES REVERSED,
IN THE
COURT FOR THE CORRECTION OF ERRORS.

SMITH and others v. WHITE, 7 Hill, 520.
In S. Ct. 4 Hill, 166.

Abatement ; Practice ; Discontinuance ; Costs ; Pleading.

PLEA in abatement of another suit depending.

A suit was commenced by the plaintiff below against the defendant in error, and discontinued before his attorney received notice of retainer from defendant's attorney, the plaintiff's attorney having duly entered his rule for discontinuance of the suit : a new suit was then commenced, to which the above plea was interposed.

The Supreme Court held that the defendant was entitled to his costs, at the time of the notice of retainer served, notwithstanding the previous discontinuance of the suit, by entry of the rule, as the defendant's attorney was retained, and gave notice of retainer without actual notice of discontinuance of suit ; and therefore the plea in abatement was held good.

The Court of Errors held that the defendants not having appeared in the first suit, were not entitled to costs, and that the rule for discontinuance which was replied, was a good answer to the plea of another suit pending.

But that it would have been otherwise had the defendants appeared in the first suit before the rule for discontinuance was entered.

Judgment reversed, 15 to 4.

BARTLETT v. CROSIER, 17 J. R. 439.

In S. Ct. 15 J. R. 530.

Action ; Overseer of Highways ; Pleading.

ACTION on the case against an overseer of highways for not repairing a bridge within his district, by reason of which the plaintiff's horse fell through and broke his leg.

The Supreme Court held that the plaintiff might sustain the action, it being alleged that the defendant had wilfully neglected to repair the bridge. That court also held that although the declaration ought to aver the commissioners of the town had provided materials and that the defendant had means to repair the bridge, yet the omission was cured after verdict by the common law intendment. But on error

The Court of Errors held that, if any private action could be sustained, it could not be against the overseer, but against the commissioners of highways for such an injury. Kent, Chancellor, in delivering the opinion of the court, seems to intimate that the remedy for the party is to sue for the penalty imposed by the statute for each neglect or breach of duty.

The judgment of the Supreme Court was *reversed* unanimously.

GOURLEY v. ALLEN, 5 Cow. 644.

Not reported in S. Ct.

Action ; Overseers of the Poor.

THIS was an action by a physician against the overseers of the town of Hebron for medical attendance bestowed on paupers, in cases of urgent necessity, but without any actual employment by the overseers, or any promise to pay.

The Supreme Court held the overseers liable upon their implied undertaking or legal obligation to provide proper medical aid for paupers. But on error

The Court of Errors *reversed* the decision, holding that no action lay against the overseers under such circumstances, though the most pressing necessity might have existed for

immediate medical assistance; the services not being rendered at the *request* of the overseers, and they not having promised to pay.

The court also held that the overseers had no right to appropriate the public moneys, &c., for the support of the poor in any case, without a previous order of a justice or justices of the peace.

In *Flower v. Allen*, 5 Cow. 654, the Court of Errors *reversed* the judgment of the Supreme Court, in a similar case, upon the same grounds.

A question was raised by Senator Spencer, whether overseers of the poor are ever liable in their *corporate* capacity? Tallmadge, President, held that they are liable, sometimes in their corporate, and sometimes in a personal capacity. That in the former case, their persons or property are not affected by the judgment, but only the corporate property. Otherwise, where they are personally liable.

See *Grant v. Fancher*, 5 Cow. 309, where the Supreme Court holds that overseers of the poor are a quasi corporation, and their successors may sue for a debt or duty due to their predecessors in their official capacity, and that where they contract a debt or neglect a duty which devolves upon them as overseers, by which they become liable to another, and then go out of office, they can not be sued as *late* overseers, but the action should be against their successors.

ALEXANDER v. GREENE and others, 7 Hill, 533.

In S. Ct. 3 Hill, 9, and see opinion of Bronson, J., 7 Hill, 537.

Action on the Case; Liability of Towboat Owners for carelessness.

THE facts of this case were as follows: the master of a canal boat laden with merchandise, being in the city of New York, obtained from the defendants, who had been engaged for ten years in the business of towing boats by means of steamboats, on the Hudson river, a permit in the following words. "Capt. H., of the steamboat N., take in tow for

Albany, canal boat A. &c., at the risk of the masters and owners thereof, and collect \$30." The permit was delivered to the captain named in it, who accordingly took the canal boat in tow, the master and hands remaining on board in charge of the boat and her cargo, and while proceeding up the river in the night time, she was run upon a rock, out of the channel, and she and her cargo lost. In an action on the case to recover the loss on the ground of the unskilfulness or want of care in the navigation, the Supreme Court held that the defendants were not liable even for gross neglect; the permit being evidence that the plaintiff agreed to *take all risks*. But

The Court of Errors held that their decision was erroneous, and that the permit does not exempt the defendants from the consequences of their own negligence; and that the cause should have gone to the jury; (a non-suit had been ordered, by the judge of circuit, and affirmed by the Supreme Court.)

Judgment reversed, 17 to 1.

☞ See *Caton v. Rumney*, 13 Wend. 387.

NOVION *v.* HALLETT, 16 J. R. 327, 347.

In S. Ct. 14 J. R. 273, 294.

Admiralty Jurisdiction ; Marine Trespass ; Prize.

THIS was an action of trover by Hallett, plaintiff below, for a brig and cargo. The plaintiff being owner of a brig called the *Jane*, sent her to trade in the West India seas, under Spanish colors. On the second of April, 1813, she set out on her voyage from Porto Cabello, loaded with a valuable cargo, protected from British capture by a Spanish owner and papers. On her voyage to New York, she was captured on the 26th of April, by a privateer called the *San Francisco de Paula*. This vessel was originally English, and being captured by a French privateer had become the property of Novion the defendant. She had been fitted out at Washington, North Carolina, by him, and when on her voyage to Carthage, while inside Ocracoke inlet, she had produced a commission stated to have been purchased at Carthage,

and hoisted Carthagera colors. The master of the Jane expressly informed the captain of the privateer that she was American and not Spanish property, but merely covered as Spanish property to protect her from capture by the English. A lieutenant and five men were put on board the Jane, then called La Hija, and she was brought to Beaufort, North Carolina, where her former master, Rise, having discovered her, she was libelled at the suit of the plaintiff and the District Court of the United States decreed her to be restored with all her tackle and apparel and all the cargo that remained on board. Also damages against the commander of the Francisco for \$1000 damages, &c. The court reserved its decision upon the claim for damages for the value of the cargo at the time of capture. No decision on it appeared to have been made.

On this evidence the defendant's counsel moved for a non-suit on the grounds: 1. That a trover and conversion had not been proved. 2. That the cause of action had already been adjudicated upon by the District Court in North Carolina; and that it was a question exclusively of admiralty jurisdiction. The motion was denied, and the judge charged the jury: 1. That if they believed the Francisco de Paula had a regular commission by a *de facto* government of New Granada or Carthagera, and claimed to act under it in capturing the brig as Spanish property, then the plaintiff was not entitled to recover, because the question of prize or no prize, belonged exclusively to admiralty jurisdiction. 2. That if the privateer had it and acted under it, yet if instead of treating the Jane as prize of war, she brought her disguised into the United States, and the defendant claimed to dispose of her, without condemnation, as his private property, then he was to be considered as a trespasser *ab initio*. 3. That if the captor had no commission, then it was legally an act of piracy, for which the captors were responsible *criminaliter* in the federal courts only, but the private injury was not merged in the felony. This charge was excepted to. Verdict for plaintiff \$29,687 80. On a motion for new trial, on the bill of exceptions,

The Supreme Court held that the charge of the judge was correct, and the plaintiff had judgment. Thompson, Ch. J.,

delivered the opinion of a majority of the court. "Several very important and difficult questions, have been raised and discussed on the argument which, according to the view I have taken of the case, it becomes unnecessary for me particularly to notice. The only question of doubt in the case was, whether this court has jurisdiction of the cause, or whether it is one of exclusive admiralty jurisdiction. That courts of common law have cognizance of marine trespasses, is a point nowhere questioned. It is not the plea, but the *nature* of the question that determines the jurisdiction of the court." He then goes on to argue that the privateer having been originally fitted out in the United States, in violation of an act of Congress, whether the commission was issued by competent authority, was altogether immaterial; for the very putting it on board within the jurisdiction of the United States, was illegal and itself a nullity. To inquire into this matter is not entertaining the question whether *prize* or not. "The illegal fitting out of this privateer in direct violation of the act of Congress, precludes the defendant from setting up the claim or pretence, that the taking was as prize; and it is upon this ground alone that I place my opinion that this court has jurisdiction of the cause." Judgment accordingly.

Spencer, J., dissented, holding that the subsequent conduct of the captors, and their treatment of the prize did not invalidate the capture itself. That if the capture was as *prize*, the common law can not notice it as a trespass. "The act of Congress is silent as to the consequences to result from a capture by a vessel thus fitted out, and it seems to me that it can not be doubted that a vessel though armed and fitted out in violation of that act may take a prize. It is *another question* whether it would be a valid capture. These considerations, however, do not belong to this court. We have no power to entertain the question. I only insist that the plaintiff has applied to the wrong forum." Yates, J., concurred with this opinion. On writ of error from this judgment,

The Court of Errors, (Chancellor Kent delivering the opinion in favor of *reversal*, and maintaining substantially the same grounds as those in Judge Spencer's opinion,) reversed the judgment of the Supreme Court unanimously, and ordered the defendant in error, to pay to the plaintiff in error two

hundred and thirty-two dollars *for his costs and charges in and about the prosecuting of his writ of error, in this court*, with directions to the Supreme Court to award a *venire de novo, &c.*

The decision of the court was pronounced in an elaborate opinion, by Kent, Chancellor.—“That the owner of the privateer is justly responsible to the plaintiff for all the damages recovered, will not also be denied. The only question is, whether the common law courts of this state have jurisdiction of the case. It is admitted that they have no jurisdiction of the original taking; but it is asserted that the subsequent disposition of the subject, if it be not treated as prize of war, may render the captor a trespasser *ab initio*, and liable to an action of trespass at the common law.

“I apprehend that no such distinction exists, and that if property be taken in the first instance as prize of war, the subsequent conduct of the captors, whatever it may be, can not alter the right of jurisdiction.

“The schooner had a commission from a state assuming powers of government, and was commissioned to take Spanish vessels. The brig captured appeared in a Spanish character. The master admits, that when taken, the privateer put a prize master and five men on board. The fact then is not to be questioned, that the brig was in the first instance, captured as prize of war.

“This being the case, it belongs exclusively to the admiralty courts of the United States, to judge of the validity of the capture, or of the competency of the commission, of the effect of the original act of arming within the United States and of every possible question arising out of the capture.”

He then reviews the cases on this subject, commencing with the governing case of “*Le Caux v. Eden*, Doug. 594, which has since commanded uniform and universal assent.”

He then pursues. “After a review of these cases, which contain a course of doctrine and precedents very nearly uniform for the last two hundred years, it would seem that there could remain no doubt of the entire and exclusive jurisdiction of the admiralty in the present case. Here is a suit in trover against the captor for property originally taken on the high seas in the character of a prize. It is not a mere inci-

dental question that is raised, but the validity of the very act of capture is directly arraigned."—"If ever a case was peculiarly fitted for a court of admiralty, sitting under the authority of the United States, and governed by the laws and usages of nations, this must be that case."

The Chancellor then reviews the American cases on the subject, and shows them to lead to the same result.

Lastly, he reviews the opinion of Thompson, Ch. J. "But the Chief Justice, in delivering the opinion of the court, said that he placed his opinion that the Supreme Court had jurisdiction of the cause, 'upon the ground alone,' that the privateer was illegally fitted out in a port of the United States, in violation of the act of Congress of 5th June, 1794." He afterwards adds; "Surely it belonged to the admiralty to take cognizance of such illegal armaments as incidental to the question of prize. It was as much a part of the *prize question*, as the inquiry touching the authority of the commission or the place of the capture, or the national character of the party captured, or his title to the property." He proceeds to review the action of the United States executive and judiciary, upon the subject of captures made by vessels illegally fitted out within the United States, and says; "After the most solemn sanction given to the power of the district and admiralty courts, on this subject, and after the irresistible deductions from these facts, that the common law courts of the individual states, have no jurisdiction in the case, I think I may safely conclude, that the ground taken by the Chief Justice in his opinion, (and which appears not to have been taken at the trial,) is as untenable as any that could have been assumed." p. 347.

Note by the Reporter: Had the fitting out of the capturing vessel, in this case, not been accompanied with a violation of our neutrality, and laws, it is clear that the question would have belonged exclusively to the courts of the country of the captor; it is only the illegality of the original equipment which can give to our courts admiralty jurisdiction of the case. Vide *L'Invincible*, 1 Wheat. 238.

✎ The Supreme Court of the United States there held, that

the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.

In the case of *La Concepcion*, the Supreme Court of the United States held that where a capture was made of the property of the subjects of a nation in amity with the United States, by a vessel *built, armed, equipped, and owned*, in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners. *La Concepcion*, 6 Wheaton, 235; 5 Condry's R. 77.

In the case of *La Concepcion*, 1821, Mr. Justice Story, in delivering the opinion of the court, puts the whole question in that case upon the single ground that the *ownership* of the vessel, she having been originally built in the United States still continued, although she went to Buenos Ayres, and sailed thence under the colors of that government on her cruise during which the capture was made. He says: "The want of a bill of sale or any document of this nature, or of any direct and positive evidence of an actual sale, leaves no doubt in the mind of the court that no such sale ever was made. The consequence is that the capturing vessel must still be considered as owned in the United States; and according to the decisions which have already been made, the capture was illegal, and the property must be restored to the original Spanish owners. (Vide *The Alerta*, 9 Cranch, 359. *The Divina Pastora*, 4 Wheat. 298. *The Estrella*, 4 Wheat. 298. *La Amistad de Rues*, 5 Wheat. 385.)

LA FROMBOISE V. JACKSON, *ex dem.* SMITH, 8 Cow. 589.

Adverse Possession.

UPON the special verdict, setting forth the particulars of the entry, grant, and possession under it, of the premises in question,

The Supreme Court held that the adverse possession set up by the defendant, La Fromboise, was not available under the statute of limitations, as the grant under which his ancestors entered, (from the French Government in Canada,) was not an effectual deed, as the grantor had no color of title.

That the grant could not therefore, constitute a valid commencement of an adverse possession, and rendered judgment against the defendant.

The Court of Errors reversed the judgment, holding that it was not necessary that an adverse possession, to be available under the statute, should commence under an effectual deed; and though the possessor claim under written evidence of title, which, in producing it, proves to be defective, yet, the character of his possession as adverse, is not thereby destroyed, nor affected by the defects of his paper title. If the entry is made under *color of title*, the possession will be adverse, however groundless the supposed title may prove. The fact of possession, and the *quo animo*, are the test. The claim of lands, under an executory contract for purchase, the consideration being paid, and of which a Court of Equity would, therefore, decree performance and enforce against the vendor, is a sufficient color of title, to constitute an adverse possession within the statute of limitations.

Judgment reversed.

It was objected upon this special verdict, that it was to be *inferred from the evidence*, that the original claim of title, was from the French Government in Canada, after that title had been extinguished; and that therefore it was void, as the foundation of an adverse possession; but Jones, Chancellor, held, that it could not be inferred by the Court, from the evidence stated in the special verdict, and that the Court would not notice the evidence of it, unless the jury had found it as a fact. He also held that mere possession of land, with-

out claim of title, will never confer a title ; but that the claim of title, however groundless, may be matured into a title, either against an individual or the people.

BROMAGHAM and others v. CLAPP, 9 Cow. 530.

In S. Ct. 5 Cow. 295 ; 6 Cow. 611.

Adverse Possession ; Partition ; Seisin and Possession of Tenants in Common.

Petition in partition, under statute for the partition of lands of April 12, 1813. Plea, that defendant, at the time of preferring the petition and at the time of pleading, was *sole* seised, and possessed in his demesne as of fee, &c., and traversing the tenancy in common. To this plea was annexed a notice, that he had been so seised, for twenty-five years previous to the exhibiting of the petition, adversely to the claim of the petitioners. Replication, that the plaintiffs were seised in fee, &c. as tenants in common ; *moda* and *forma*, and issue to the courts.

On the trial at the circuit, it appeared that William Bromagham, father of the plaintiffs, being seised in fee of the premises in question, died intestate about the 15th of January, 1799, leaving the plaintiffs, three of his children, and six others his children and heirs at law, nine in the whole. Previously, in May, 1795, he had been declared a lunatic ; and in August following, Peter, his son, was appointed his committee by the Court of Chancery, and took possession of his real and personal estate. In October, 1802, Peter having purchased the right of his brother Isaac, contracted to sell the whole of the premises in question, to the defendant in fee, and May 3d, 1803, he conveyed the whole to him. The defendant had entered some time in March before ; and has continued in possession, claiming title ever since. Jemima Martin, one of the plaintiffs, was feme covert in 1803 ; but her husband died 13 years before this proceeding was commenced. Verdict for plaintiffs, subject to the opinion of the court.

The Supreme Court held upon this state of facts, that though the defendant's possession was *adverse* from the 3d

of May, 1803, and the possessor's right of all the plaintiffs gone by the lapse of 20 years; yet as the possession was short of twenty-five years, and therefore no bar to a *writ of right*, the Court were bound to proceed under the statute, and ascertain the rights of the parties; and that, to warrant proceedings in partition, it was not necessary that all the parties should be actually seised when the suit is commenced, as possession is not awarded in the action. On writ of error from the Supreme Court.

The Court of Errors held, that the issue made by the pleadings in the cause, was a proper one in partition under the statute, and that it was incumbent on the plaintiffs to prove at the trial, that they were *seised in common*, according to the meaning of the issue, and that twenty years *adverse possession* would bar a suit for partition.

The Chancellor, (Jones,) who delivered the only opinion reported, maintains that in proceedings for partition, the plaintiff or petitioner, must allege that he is *seised*, and show an actual present possession; that a mere *right of entry*, will not satisfy the averment of *seisin*; and that therefore, an adverse possession of the defendant though *short of twenty years* is a bar." Quere?

He also holds, that though a judgment in partition does not change the possession, yet, in an ejectment or writ of right, it would be conclusive between the parties. The jury, therefore, should have been instructed, that if they found the adverse possession proved to their satisfaction, they should render their verdict for the defendant.

It was held by the whole court, that any one defendant in partition may bring Error separately.

Judgment reversed.

✎ S. C. 6 Cow. 611. held by S. C. that bail in error, is necessary to stay proceedings in partition. See 8 Cow. 746, and 9 id. 304, on motion to amend writ of error.

LIVINGSTON v. THE PERU IRON COMPANY, 9 Wend. 511 to 538.

Adverse Possession under Fraudulent Deed.

THIS was a bill to set aside a deed of premises, charging it to have been fraudulently obtained by the grantees, and praying other appropriate relief. The complainant was the grantee of the same premises under a deed *bona fide* and for good consideration.

The Chancellor decided that the fraud in obtaining the deed was sufficient to avoid it, but that the complainant was not in a situation to take advantage of it, as his own deed was void, being executed to him when Murray and Palmer were in *possession*, under the first deed, and *holding adversely*.

In the Court of Errors, on appeal from this decree, Savage, Ch. J., in his opinion in favor of *reversal*, states this to be the only question presented to the court. The court held, in conformity to his opinion, that a deed fraudulently obtained, is not available as the foundation of an adverse possession, so as to avoid a subsequent conveyance: nor is a deed available for such purposes executed by a person assuming to act as the attorney of the grantor, but without authority, when such want of authority is known to the grantee.

It was also held that to constitute a *possession adverse*, so as to bar a *recovery*, or to *avoid a deed* subsequently executed by the true owner, the party setting up the possession must in making his *entry* upon the land, act *bona fide*; he must rely upon his title; he must believe the land to be his, and that he has title thereto, although his title may not be rightful or valid, but if the title be an absolute nullity, as a deed obtained by *fraud* or *forgery*, it will not serve as the foundation of an adverse possession.

Judgment reversed, 10 to 8.

SCHAUBER v. JACKSON, *ex dem.*, BOGERT and others, 2
Wend. 13, 64.

In S. Ct., 7 Cow. 187, 417, 490.

Adverse Possession ; Evidence ; Presumption.

THE statement of the facts in this case, is taken from the opinion of Stebbins, Senator, and seems to contain all that is essential to a right understanding of the points decided in the Supreme Court and in the Court of Errors. That Senator was for *reversal*.

"The lands in controversy in this cause, are situated in the county of Saratoga, and are part of a tract granted by letters patent to William Appel in 1708. The father of Schauber entered upon the premises when in a wild state, about half a century since, without any claim of title, and frequently acknowledged that the owner was unknown to him, and applied to others for information in regard to the title, with the avowed purpose of purchasing. Not being able to find the owner, he continued clearing and cultivating the land, building on and improving it till his death, and then transmitted his possession to his son, the defendant below. The plaintiff below claimed title as the descendants and heirs of William Appel, the patentee, through his oldest son and heir Simon Appel.

The defendants to show that plaintiffs were not entitled to recover introduced the will of William Appel, by which he "bequeathed to his son Simon twenty shillings for his *birth-right*, to be raised and levied out of his estate, wherewith he utterly excludes, debars, and precludes him from having or claiming any other or further pretensions, claims, and demands, whatsoever, as being his heir at law, or by any pretence whatsoever."

According to the English law, in force at the death of William Appel, his eldest son Simon was his *heir at law*, unless the descent was broken by the will. The will then authorizes, empowers, orders, and directs his executors, to sell the whole of his real and residue of his personal estate—and to divide the moneys arising from the sale—one fifth to each of his sons Simon and Johannes, one fifth to each of his

two daughters, and one fifth to a grandson, and appoints Johannes and his daughter Engeltje executors of his will. The daughter renounced, and letters testamentary were issued to Johannes alone." Per Stebbins, Senator.

Upon this evidence and some other intended to show that some part of the lands patented had been conveyed by grants of third persons; but not of these premises; and of a mortgage more than twenty years old, on which nothing had been done—the defendant insisted at the trial, that he had shown title *out* of the lessors of the plaintiff, and that therefore his own possession, such as it was, was protected as against them, and that a grant might be presumed by the jury, &c.

The Circuit Judge (Walworth) charged the jury that in his opinion, the evidence was not sufficient to *prove* nor to authorize them to presume that William Appel, or his heirs or representatives, had aliened the premises to any person so as to divest the title of the lessors of the plaintiff as heirs, if they had proved themselves such heirs, but that the evidence was proper for their consideration, in determining whether they were such heirs, and that in his opinion the evidence was sufficient to warrant the jury in finding a verdict for the plaintiff, but that was a matter for their consideration; which charge was excepted to. Verdict for plaintiff. And on motion for new trial,

The Supreme Court held that the charge, as well as the verdict upon the evidence was right. That the court will not, nor is a jury authorized to presume a conveyance by the executor's having a *naked power of sale*, or to presume a continued outstanding title, against the heir, to protect the possession of a mere *intruder*, without color or pretence of title, even after the lapse of more than forty years possession of the latter. That courts will not countenance presumption of outstanding title in favor of a mere intruder, who enters avowedly without pretence of title. That therefore *a mortgage of more than twenty years standing, on which no interest has been paid, and under which, no entry or foreclosure has taken place, is not such an outstanding title* as will bar an ejectment by the mortgagor or his heirs.

The Supreme Court also held that the direction to the ex-

ecutors to sell, &c., did not break the descent at law, notwithstanding the disinheriting legacy, and the declaration that he should take nothing as heir. *Otherwise*, if he had devised the land to the executors, the heirs at law can only be disinherited by an express devise, or by necessary implication to some other person. That the executors here took merely a naked *power* to sell without an *interest*. On writ of error to this decision,

The Court of Errors held that the judgment was erroneous and should be *reversed*—by a vote of 12 to 10.

After this decision the Chancellor (Walworth) proposed that the court should definitely express the grounds upon which the judgment of this court was pronounced. "Whether the court was of opinion, that by the will of William Appel, an estate was given by implication to the executors, *or* whether they were of opinion that the facts and circumstances of the case should have been submitted to the jury *so as to authorize them to presume* a conveyance from William Appel, the patentee, or his executors. Several members observing that their opinion had been formed only on a consideration of the latter proposition, the question as to the legal construction of the will was not put. The other question was however put, namely :

"Ought the facts and circumstances of the case to have been submitted to the jury, so as to have authorized them to presume a conveyance from William Appel or his executors, if in the judgment of the jury, such facts and circumstances were sufficient to authorize such inference?" Which resolution was passed by a vote of ayes 16 noes 7.

Judgment reversed accordingly.

ADAMS v. ROCKWELL, 16 Wend. 285.

In S. Ct. 6 Wend. 467.

Adverse possession ; Encroachment ; Acquiescence ; Evidence.

THE Supreme Court held, that the acts and declarations of parties as to the *location of lands*, and thus creating a *conventional line*, may overrule the courses and distances in

their deeds; and that to give effect to such acts and declarations, it is not necessary that their legal operations upon the vested rights of the parties should be known to the parties against whom they are sought to be enforced."

"Acquiescence in an *erroneous* location, for a great length of time (*e. g.* 18 years) is *conclusive* upon a party making or acquiescing in such location.

"Evidence of the actual possession of settlers on adjacent tracts, in reference to a *division line*, attempted to be shown as recognized by one of the parties in a suit, is admissible.

"Where a *division* line between adjoining tracts, exists at its two extremities, and for the *principal* part of the distance between the two tracts, and as such is recognized by the parties, it will be a continuous line, although, on a portion of the distance, there is no improvement or division fence."

This was an action of replevin to recover certain logs cut on the disputed tract by the defendant, and on examining the facts and declarations relied on to support the conventional line, it is not at all surprising that the decision of the Supreme Court was *reversed* by the Court of Errors. 21 members for reversal, and 1 only dissenting.

The Court of Errors held, 1. where lands are described in a deed conveying the same, clearly and distinctly by courses and distances, so that upon actual survey, the true location of the tract can be ascertained with absolute certainty, the owner may assert his title to hold according to the true boundaries of his lands, notwithstanding that an encroachment has been made upon him by the owner of an adjoining tract, a line maintained in pursuance of such encroachment, recognized by the party encroached upon, and acquiesced in by him for a period of *eleven years*; *if the lands in dispute are in a state of nature*, i. e., covered with timber, and no other occupation has been had than the occasional cutting down of trees and drawing away of timber.

It seems that if during *such acquiescence*, expensive improvements by the erection of buildings or otherwise, had been made by the occupant upon the premises in dispute, the owner would have been held estopped from setting up the true line.

There was no evidence in this case of a deliberate settle-

ment of the erroneous line by *express agreement* founded upon a *bona fide* attempt to ascertain the true boundaries by *actual survey*, according to the courses and distances of the older deeds, both parties deriving title from the same source.
Judgment reversed.

NORTHROP v. WRIGHT, 7 Hill, 476.

In S. Ct. 24 Wend. 223.

Adverse Possession ; Evidenc.

IN ejectment for an undivided part of a lot of land, brought by N. who claimed under a deed from one of the children of A., the following facts appeared. A. died in possession of the lot sometime between 1776 and 1782, leaving several children to whom he devised his real estate, in general terms, as tenants in common. After his death, P., one of the children, took possession of the lot, and continued to hold it for three or four years, when possession was taken by E.; but in what right or under what circumstances did not appear. E. exercised various acts of ownership upon the lot, and died possessed of it in 1798, having devised it to his son M. in fee. M. entered into possession, and continued to hold the lot until 1801, when it was sold by the sheriff to S., under a judgment for \$7,000 recovered against M. about a year before. The sheriff's deed recited among other things, that the sum bid and paid on the lot was \$2,275, and that M. was seised in fee of the lot. At the time the judgment was recovered against him, S. took possession of the lot, under the sheriff's deed, and in 1805 sold it to K. for \$7,900, by a *quit-claim* deed purporting to convey the entire fee. In 1807, some of N.'s children and descendants executed a *quit-claim* deed to K. in consideration of \$700, but there was nothing to show what interest they professed to have, or how they derived it, the deed being general in its terms. By various other successive *quit-claim* deeds, each purporting to convey the entire fee, the title of K. became vested in W., who was in possession in 1834, when this action was brought. It was admitted on the trial, that K., and all the subsequent

grantees had been in possession, under their respective deeds : and W. accordingly defended, on the ground of adverse possession. The Circuit Judge charged the jury among other things, that the possession of E. commenced under very suspicious circumstances ; that the fact of the sheriff's sale having taken place so very soon after the death of E., was important to show that he had no deed ; that as the conveyances under which the defendant derived title, were mere quit-claim deeds, no inference could be drawn from them that the grantees claimed an absolute right, and that the deed to K., given in 1807, clearly showed that the heirs of A., made claim to the premises. The Supreme Court having refused a new trial, on error,

The Court of Errors held, that the charge was erroneous, as calculated to mislead the jury on the question of *adverse possession*.

See opinion of Walworth, Ch., who says that the decision made in *Brown v. Kimball* (25 Wend. 259), is not to be considered as settling the law, beyond the particular facts of that case.

Judgment reversed, 16 to 4.

BRADFORD v. ALBANY DUTCH CHURCH, 8 Cow. 457.

Not reported in S. Ct.

Agreement.

BRADFORD, the plaintiff below, defendant in error, brought his action to recover a portion of his salary as minister of the Reformed Dutch Church in Albany, under a contract with the Church, to act as its minister for a stated salary, founded on a *call* referring to the rules of church government, established in the national synod held at Dordrecht in 1618, and 1619, and the articles explanatory of the government and discipline of the Reformed Dutch Church, in the United States of America. After some time the plaintiff was arraigned before the Church tribunal, having jurisdiction of such complaints on representations, or charges of personal misconduct ; and by a sentence of that judicatory was sus-

pended from his functions and duties as such minister ; finally, a sentence of dissolution of the pastoral connection, between him and the church for his continued faults, was pronounced by the proper judicatory, and affirmed an appeal by him to the superior church jurisdiction ; whereupon, he brought this action for his salary, intermediate his suspension, and the sentence of dissolution :—

The Supreme Court held him entitled to recover it, as the mere suspension did not dissolve the relation ; and that he was entitled to his salary while that continued. But on writ of error by the church,

The Court of Errors held, that, as where one contracts to perform certain labor, or service for which he is to receive a stated compensation, performance or an ability and readiness to perform in the manner stipulated, are a condition precedent to the compensation becoming due :—that the contract in this case, to perform certain spiritual functions, and duties, formed no exception to the general rule, and that as the sentence of suspension was incurred by the fault of the minister, that he was not entitled to his salary between the date of his suspension, and the final sentence of dissolution of the pastoral connection.

SANDFORD v. HALSEY, 2 Denio, 235, 272.

Not reported in S. Ct. but *Sanford v. Handy*, reported 23 Wend. 260, and 25 Wend. 475. In S. Ct., was an action on the same agreement, and presents the reasons of the Supreme Court more fully than the opinion of Nelson C. J. given in 2 Denio, 242–6.

Agreement ; Liability of a Joint Stock Subscriber.

COVENANT against subscriber to articles of joint stock purchase of lands.

In this case, the owner of lands, the plaintiff in error, issued proposals for the establishment of a *Joint Stock Company* to purchase them, estimating the value at a certain sum, and dividing it into twenty-three *shares* of \$5000 each :—each subscriber to be interested in the purchase to the extent of the number of shares taken by him, and the proper-

ty to be controlled and disposed of by a majority of such persons as should become subscribers. It was held by

The Supreme Court, that a subscriber for one or more shares was not liable for the amount of his subscription, unless the whole number of shares was taken up and could not be compelled to become a *tenant in common* with the owner of the land, unless the whole scheme was carried into effect. On writ of error to this court, it was held by

The Court of Errors, that, as the subscribers were, by the terms of the agreement, to be *severally* interested in the shares set opposite to their *respective* names, and each to pay his share *respectively*, in certain instalments, and to give their notes and bonds therefor; yet, although eighteen only were subscribed for, besides the defendant's one share, that *covenant* might be maintained against the defendant, for an instalment of his subscription, he having refused to give his bond, and that it was not a condition of the agreement, that the whole twenty-three shares should be subscribed for, and that the defendant was liable for the amount of his subscription, notwithstanding only a part was taken up.

Judgment reversed, 15 to 14.

WILLIAMSON v. HEYER, 4 Wend. 170.

Dismissal of Appeal.

IN this case, on a motion to dismiss an appeal as brought from an order of the Chancellor, to which an appeal does not lie.

The Court of Errors held, an order denying a motion for the *re-hearing of a motion* for instructions to a master in the examination of a witness, would not be entertained, and that an appeal from an order refusing a *rehearing* in any case, would not be sustained unless under very special and peculiar circumstances.

Appeal dismissed with costs.

CHAPMAN and others, appellants, v. HAMMERSLEY and others, respondents, 4 Wend. 173.

Dismissal of Appeal.

IN this case the court held that an appeal did not lie from an order of the Chancellor directing the sale of property, the subject of contest between the parties litigant, and ordering the money to be brought into court to abide the final order to be made upon the rights of the parties, such order relating only to the preservation of the property, and not affecting the merits of the cause.

Appeal dismissed with costs.

KANE v. WHITTICK, 8 Wend. 219, 247.

Dismissal of Appeal.

THIS was an appeal from a *decretal* order of the Chancellor, in a case where a bill was filed charging a *deed* conveying lands, *absolute on its face*, to be a mortgage, and claiming to redeem, &c. The *decretal order* appealed from, adjudged the deed to be a mortgage, and referred it to a master to take and state an account, &c. The defendant's appeal was not brought as from an interlocutory order, within fifteen days, but he treated the order as a final decree, and brought appeal after the expiration of the time limited to appeal from an interlocutory order. On motion to dismiss the appeal,

The Court of Errors held, that such an order of reference was not a final order or decree within the meaning of the statute limiting appeals; and the appellant not having brought his appeal within the time limited by statute to prosecute it, the appeal was accordingly dismissed.

The court held also that if in such case, on the coming in of the master's report, the defendant suffers a decree confirming the report and awarding execution, for the amount certified to be due, to pass against him *by default*, and then files an appeal, as well from the order adjudging the deed to be

a mortgage, as from the decree confirming the master's report, and awarding execution, the appeal will not lie, and will be *dismissed*, it being in operation as to the first order, because not made within fifteen days, and as to the second because permitted to be entered by *default*.

Appeal dismissed, 15 to 7.

It was questioned in this case, whether even if the master's report had been excepted to, and its confirmation opposed on the final hearing; the appeal from the final decree would have opened for consideration the *previous order* adjudging the deed to be a mortgage; no such connection existing between the last decree and the order as necessarily to involve the consideration of the previous order; but see *Jagues v. The Methodist Episcopal Church*, 17 J. R., 548, where it is held that all prior orders and decrees, in any way connected with the merits, are opened for the consideration of the Court of Errors.

It was also *doubted*, whether a party who had submitted to and acted under an order of reference, declaring the principles upon which it should be conducted, would not, on that ground, be estopped, on an appeal from the final decree, from calling in question the correctness of such previous order.

[Sutherland, J., in the course of his opinion, seeks to explain what was said by him in the case of *Atkinson v. Manks*, 1 Cow. 691, by saying that there was an appeal from the *order* in that case, as well as the *final decree*. It is true that in the case of *Bank of Orange County v. Fink*, Chancellor Walworth held that on an appeal from a final decree, the merits of an interlocutory decree can not be inquired into: but this seems so incompatible with the well settled principle, that a Court of Appeals will make such a decree on the whole merits, as the court below should have done, that neither that case or that of *Mapes v. Coffin*, 5 Paige, 296, were generally acquiesced in by the profession.]

The propriety of dismissing the appeal in *Kane v. Whittick*, is by no means intended to be called in question by these remarks.

HOUGHTON v. STARR, 4 Wend. 175.

Dismissal of Writ of Error.

IN this case, the defendant brought a writ of error for several defects in the record. 1. The *verdict was defective*; the damages found by the jury exceeding the damages laid in the declaration. 2. The judgment was entered for the damages and costs *only* in an action of *debt*, thus giving damages and costs, where no *debt* was found. 3. The judgment was *general* against the defendant instead of *special*, by exempting him from imprisonment, after a *plea* of an insolvent discharge *confessed* by plaintiff; but

The Court of Errors *dismissed* the writ of error, *with costs*, on the ground that the party might have obtained relief in the Court below, if he had sought it there.

And this, although it was shown that after the entry of the judgment, and before the suing out of the writ of error, the defendant below, applied to the Supreme Court to *set aside* the proceedings of the plaintiff for *irregularity*; but it did not appear that he had asked for a correction of the *specific error*, relied on for a reversal of the judgment.

THE PEOPLE, *ex rel.* DYCKMAN, v. THE TRUSTEES OF BROOKLYN, 13 Wend. 130.

In S. Ct. 1 Wend. 318.

Dismissing Writ of Error.

This was an application on motion for a *peremptory mandamus* to the trustees of Brooklyn, to compel them to file a report of commissioners of assessment and estimate, and obtain a confirmation of the same, and to have the damages which had been awarded, duly assessed, &c.

The Supreme Court refused to issue the *peremptory mandamus*, as the relator did not show a complete, but only an inchoate right, and therefore, was not entitled to a *mandamus*; that this writ will not be allowed, unless there is no other specific remedy, and the Court, therefore, left the party to his remedy by action.

The relator brought a writ of error on this refusal of the Supreme Court, to issue the peremptory *mandamus*. A motion was made on the part of the trustees, to dismiss it as irregularly and prematurely brought.

The Court of Errors, accordingly dismissed the writ of error, holding, that a writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory *mandamus*, when application is made *on motion*:—that it lies only for the *relator* when judgment is pronounced after issue, joined upon plea or demurrer, interposed upon the coming in of the return to the alternative *mandamus*; and the writ of error was accordingly *dismissed*.

ARBITRATION.

UNDERHILL *v.* VAN CORTLAND and others.—*Or. bill in Ch.*

VAN CORTLAND *v.* UNDERHILL and others.—*Cross bill.*

In Ct. of Err. 17 R. 405. In Ch. 2 J. C. R. 339.

Arbitration; Award; Jurisdiction of Chancery in setting aside Award, and in what Cases.

THE bill in this case was filed by Underhill and others, in the Court of Chancery, to have carried into effect an appraisal or award made in their favor against Van Cortland and others, by three appraisers or arbitrators, appointed by the parties under the covenant in a lease for a term of years of certain water privileges, mill, &c., of which lease Underhill and others, the plaintiffs, were assignees. The covenant was to pay the lessee or his assigns, &c., the value of the buildings, mills, improvements, &c., which they might put upon the premises during their term: for which purpose two appraisers, and in case of difference, an umpire, were to be chosen, in the manner pointed out in the lease. The appraisers awarded the plaintiffs \$18,500, for the buildings, dam, &c., from which they also awarded that the

value of the timber cut on the premises by the plaintiffs, should be deducted when ascertained, &c. The plaintiff's bill prayed that the defendants might be decreed to pay the sum awarded, deducting the value of the timber, and that an account might be taken of that, &c. The defendants' answer set up various matters relative to the appraisement, the conduct of the appraisers in excluding proper evidence, &c., on account of which they alleged the valuation to be erroneous, excessive, and void. In their *cross bill*, they made the plaintiffs and the three appraisers defendants, but the name of one of them was afterwards struck out, that he might be examined as a witness. Proofs were taken by the parties in support of their respective allegations, which it is not necessary to review, as the decision of the cause in the Court of Errors, turned upon the single ground of the misconduct of the arbitrators in refusing to hear pertinent and material evidence. A question was made on the hearing, whether the appraisers were to be considered as mere appraisers, or as arbitrators who had power to make such an award; but as the distinction was considered an immaterial one in both courts, it is not deemed necessary to do more than refer to it.

On the hearing before the arbitrators, Van Cortland and the defendants, offered to prove the original cost of a dam and raceway, which had been constructed twenty years before, with a view to establish their value at the time of appraisement, and to show that the plaintiff's claim was grossly disproportioned to their original cost and present value. This evidence the appraisers declined to hear. It is on the different views taken by the Chancellor and the Court of Errors of the effect of this rejection of evidence, that their conflicting decisions are placed.

The Chancellor says: "The rejection of evidence to show the original cost of a dam and raceway, was the first ground on which the award was sought to be set aside."

"It can not surely become a question whether evidence of the cost of a dam and raceway built twenty-one years before, was material in an inquiry as to their existing value. There could be very little, if any analogy, considering the space of time which had intervened, and the great varia-

tions in prices, labor and business, and many other circumstances connected with such works. I doubt whether any court of justice would have deemed such evidence, in such a case, pertinent. Instead of guiding it would probably have misled." He therefore concludes that its rejection was no *misconduct* on the part of the arbitrators, or even want of due discretion.

As to the *over valuation*, alleged as a ground of setting aside the award, the Chancellor says that, "as no corruption or partiality is alleged, and no misconduct on the part of the arbitrators, or of fraud on the part of the plaintiffs had been shown, the court can not inquire into the charge of an over or under valuation; or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. The decision by arbitrators is a decision by judges of the parties' own choice and election. The Chancellor accordingly decreed in the original suit, the amount of the award to the plaintiffs, on account, &c., as prayed for, reserving it for further directions."

On appeal from this decree, the two suits came on to be heard before the Court of Errors on the merits, and the Court of Errors *reversed* the Chancellor's decree.

Spencer J. delivered the opinion of the majority of the court. He stated that "his opinion in favor of *reversal* was based upon the rejection of the testimony as to the original cost of the dam and raceway. This was certainly offered to be proved, and the arbitrators refused to hear it.

"His Honor, the Chancellor, considered the proof offered of the original cost of the dam and raceway, as delusive and injurious, and (citing his language on this point,) I am under the necessity of dissenting from the opinion of the Chancellor. The evidence of the original cost of the dam and raceway, would not only be admissible and pertinent evidence, but under all the circumstances, the only and the best evidence to enable the arbitrators to ascertain the value of the works and erections, as contemplated by the parties in the lease." (17 J. R. 413.)

"What then, could throw so much light on the then value of the subjects to be appraised, as evidence of what it originally cost to make them? The lapse of time which had

intervened, would make it necessary and just to make very considerable deductions from the first cost, in consequence of the decay of parts of the works. And if there are variations in the prices, &c., nothing can be more easily proved.

"I am entirely satisfied that the arbitrators refused to hear legal, pertinent, and material evidence; and that such refusal amounted to *gross misconduct* in them; and that by the well-established principles of equity, it is good cause for setting aside the award."

The decree of the Chancellor was accordingly reversed in both suits, the bill of the plaintiffs in the original suit below, ordered to be dismissed with costs below to the defendants therein, and decree made in the cross suit that the appellants have the relief sought for and prayed in their cross bill &c.

For reversal 19, affirmative 7.

WELLS v. LAIN, 15 Wend. 99; 7 Wend. 175.

Submission to Arbitration.

ACTION of slander.

Court of Errors held.—A parol submission to arbitrators, of a cause depending in court, is good, notwithstanding the existence of a general rule of the court in which the cause is pending, that no agreement between the parties in respect to the proceedings in a case shall be binding, unless reduced to the form of a rule, or the evidence thereof be in writing, subscribed by the party against whom the agreement is alleged.

The judgment of the Supreme Court was on this point *reversed*.

ELMENDORF v. HARRIS, 23 Wend. 628.

In S. Ct. 5 Wend. 516.

Award ; Umpire.

THE Supreme Court held, in a suit against a surety in an arbitration bond, that where a submission in writing had been made, (before the Rev. Stat.) that it was competent for the party prevailing in the arbitration, to show an appointment of an umpire by parol, unless the submission required it to be made in writing; and that no notice of hearing was necessary to the losing party.

The Court of Errors, held, however, that this award, made without *notice of the hearing* before the umpire *to the losing party* was void; that an *umpire* cannot be appointed by parol, where, as in this case, it was expressly agreed, that the submission should be made *a rule of Court* under the statute:—though it would be good if it had been a mere common law arbitration. Per Chancellor, W. delivering the opinion of the Court.

Judgment reversed 18 to none.

BUTLER v. THE MAYOR, &C. OF NEW YORK, 7 Hill, 329.

In S. Ct. 1 Hill, 489.

Award ; Submission ; Evidence.

THE submission in this case, was limited to the “appraisal of the diminished or increased cost, consequent upon any alteration in the form, proportions, or construction of the building, called the Halls of Justice.”

The arbitrators awarded, that the plaintiff was *entitled to receive* from the Mayor, Aldermen, &c. of the city of New York, the sum of \$2,385, for the increased cost of said building, “*after he shall have filled up the outside paved ways.*”

Upon this award, Butler sued the Corporation of New York, in the Superior Court of the City of New York and obtained judgment; but in consequence of certain

decisions at the trial, a portion of his claim was excluded. He accordingly brought error to the Supreme Court, where the judgment of the Superior Court was affirmed.

The plaintiff offered to prove by parol on the trial of the cause, that the arbitrators had allowed against him, a large sum for defective workmanship, in those parts of the building which *had not been altered in form or construction*. The Court, however, rejected it.

The Court of Errors held, this parol evidence was admissible to invalidate the award, by showing that the arbitrators exceeded their powers, though the submission and award are in writing, and under seal; and that the rule being the same in this respect, both at law and in equity, the plaintiff might thus on the trial at law, impeach the award, which was set up to defeat his recovering.

They also held, that such an excess of the arbitrators beyond the limits of the submission, would avoid the award.

Judgment reversed, 13 to 1.

ASSUMPSIT.

THALLHIMER v. BRINCKERHOFF, 3 Cow. 623.

Reported 20 Johns. 386.

Assumpsit ; Money had and Received ; Champerty.

H. J. who claimed land as heir at law of his father, and who was about to commence suits for the recovery of it, entered into an agreement with the plaintiff who had married his sister, by which he covenanted in consideration of the premises, &c., to convey to the plaintiff, the one-quarter properly recovered; and the plaintiff promised by the same instrument, to pay one-half of all the expenses of prosecuting the suits: the defendant, who drew the agreement, as attorney of H. J., and the plaintiff, brought actions of ejectment against the parties in possession, and afterwards, by virtue of a power of attorney from H. J. for that purpose, but without the knowledge of the plaintiff, compromised

with the tenant, and received from them a large sum of money.

The Court of Errors reversed the decision of the Supreme Court which held it to be champerty, and decided, that the plaintiff might maintain assumpsit for money had and received to his use, and that the agreement was not tainted with champerty, and that the husband whose wife might, by possibility, be heir of one who claimed the land, might aid his brother-in-law in the maintainance of his suit upon an agreement to have a part of the land.

HATCH v. MANN, 15 Wend. 44.

In S. Ct. 12 id. 463.

Assumpsit; Action by Officer for Extra Compensation, in addition to his fees.

THIS case began thus:—

Mann sued Hatch before a justice of the peace, for services rendered by him in arresting one G. on a justice's warrant. He proved that he, on being applied to at an unseasonable hour, declined the service; but on Hatch's offering to "pay him well for it," he agreed to perform it, and employed a person to assist him; that they went to the house of G. at three o'clock in the morning, and at about day break, succeeded in arresting him. The service was proved to be worth *one dollar and seventy-five cents!* The cause was tried by a jury of their peers, who found a verdict for the plaintiff for that amount. Certiorari therefrom to *Yates County Common Pleas*. Judgment of the Justice affirmed by that tribunal. Thence to the Supreme Court by writ of error, which court affirmed the judgment with costs. Thus far the plaintiff had triumphed over his persevering adversary. But alas! his day of *reverse* was at hand. The undismayed defendant, brought a writ of error to the Court for the Correction of Errors.

The defendant, on the trial before the justice, had offered to prove that at the time of the service of the warrant, Mann was a constable; and that of course, he was in duty bound

to serve all process put into his hands. This evidence was objected to by the plaintiff, and rejected by the justice.

The Court of Errors seeing the important principle involved in this contest, and that it concerned them as the court of last resort, to see that the republic should receive no detriment, took the case into careful consideration; and thereupon it was adjudged, that the constable could not recover his \$1,75, upon the agreement set up as the foundation of his action, as the act was one done in the performance of his official duty; and it was against the statute (2 R. S. 650, § 5,) to take any-thing beyond legal fees. The Court therefore, reversed the Judgment.

Judgment reversed, 18 to 5.

DOWNER v. THOMPSON, 6 Hill, 208.

Reported 1 Hill, 138.

Assumpsit; Goods sold and delivered; Province of the Jury.

THE plaintiff in error, Downer, sued Thompson in the court below, for goods sold and delivered, and goods bargained and sold. P. residing in Westchester county, addressed a letter, August 21, 1838, to D., directing him to forward him 250 barrels of cement, as soon as practicable, adding, "I hope the quality will be of the best." On the 4th of September, the plaintiff forwarded 260 barrels which arrived at Hastings on the 17th of the same month. The captain of the schooner which brought it, informed the defendant that he had the cement ready for delivery; who on going on board and ascertaining the quantity, said he had not ordered so many, and after making several experiments to ascertain the quality, he finally refused to accept it, saying, "it was not as good as he had sent for, and he should not take it at any rate." The captain then observed that if the cement was not accepted, he must carry it to New York, and store it, which he did. He did not offer to the defendant 250 barrels only, nor tell him that he could have any quantity less than the 260 barrels.

The defendant, October 11, 1838, wrote to the plaintiff: "The 250 barrels of cement which you sent to Hastings in compliance with my order, were upon inspection rejected, and were then removed by your captain." He further states that he is "advised by counsel that he is not liable, the warranty the law implies, that it shall pass inspection at the works, having failed; under these circumstances, and as my contract made it necessary to procure other cement, which I have done, you will take notice that I have nothing to do with it."

Upon this evidence, a motion for a non suit was made, and granted on the ground that it did not sustain either the count for goods sold and delivered, or goods bargained and sold. The plaintiff excepted.

The Supreme Court held the non suit proper. On a motion for a new trial,

The Court of Errors held that the non suit was erroneously granted, and that the case should have been submitted to the jury; for if the entire quantity of cement delivered to the carrier was intended as a mere compliance with the order, and was not sent for the purpose of charging the defendant with the excess, he was liable.

Judgment reversed.

STEWART v. THE TRUSTEES OF HAMILTON COLLEGE, 2 Denio, 403, 409.

See opinion of S. Ct., 2 D. 408, by Nelson, Ch. J.

Assumpsit; Subscription to Donation to a College.

THIS was an action of assumpsit, brought on articles of subscription for the benefit of Hamilton College, by which the subscribers bound themselves: 1. To pay the sums set opposite their respective names, to be invested as a fund, and the interest applied to the payment of the officers' salaries. 2. "That we shall not be holden to pay the sums subscribed by us, unless the aggregate of our subscriptions and of contributions to this object, shall, by the 1st of July, 1834, amount to \$50,000, nor until M. H., or A. B., shall

certify that in his or their judgment, responsible subscriptions or contributions amounting to \$50,000, shall have been made."

The \$50,000 was not raised by actual subscriptions to these *articles of subscription*, but on the 19th of June, 1834, fourteen persons of ample responsibility, signed and delivered, a paper, by which, for value received, they undertook to pay to the corporation of the college, the amount of any deficiency in the subscription to the fund of \$50,000 which should exist on the 30th day of June, then next. This was laid before M. H., above referred to, with the other subscriptions, on the occasion of making his certificate; which was to the effect, that in his judgment, responsible subscriptions and contributions to the sum of \$50,000, had been made for the object specified in the subscription paper.

On the trial, the defendant moved for a non suit, after the plaintiff had rested, on the grounds: 1. That his undertaking was void for want of consideration. 2. That the subscriptions had not made up the \$50,000; unincorporated associations, and married women, being among the subscribers; and the agreement of the fourteen to make good the deficit, was not binding on them, as a mere nominal subscription would discharge it; and besides that it was void for want of consideration. 3. That the proof varied from the case stated in the declaration. Non suit denied. Bill of exceptions, and a verdict for plaintiff, for amount of subscriptions remaining unpaid.

The Supreme Court sustained the verdict, whereupon a writ of error was brought to this court.

The Court of Errors held *either* that the agreement was void as *nudum pactum*, or that the condition as to the \$50,000 was not fulfilled by the undertaking of the fourteen to supply any deficiency, or that the *agreement* was not good under the statute of frauds, as not setting forth any consideration, or that the consideration laid in the declaration, was not sustained by proof; as one or other of these points is maintained by some, and dissented from by other senators, and it is difficult to say on which ground the decision is to rest.

However, judgment was *reversed* by 21 to 5.

HUNT v. AMIDON, 4 Hill, 345.

In S. Ct. 1 Hill, 147.

Assumpsit.

THE defendant A., sold certain real estate to W., who gave back a bond and mortgage, which the defendant assigned to T. Afterwards W. re-conveyed the premises to the defendant, who then deeded them to B., covenanting for quiet enjoyment, and B. conveyed to the plaintiff, whereupon T., the assignee, proceeded to foreclose the mortgage, and on the sale under it, Hunt, the plaintiff, became the purchaser. In an action brought by Hunt against Amidon, of assumpsit, for money paid, &c.,

The Supreme Court held, that the action would not lie by the plaintiff to recover from defendant the amount paid by him on the foreclosure sale, even though the defendant had on his selling to B., the grantee of the plaintiff, verbally promised him to pay off the mortgage; and consequently, evidence of the promise is, in such case, irrelevant, and inadmissible. Bronson, J., says, delivering the opinion of the court: "Surely, the promise did not run with the land, and so pass by Babcock's deed to the plaintiff; and there has been no assignment of it in any other form. But if there had been, the assignee could not sue in his own name. The defendant is bound by his *express* contract, the covenant for quiet enjoyment, and the plaintiff can not recover upon an implied promise." On writ of error,

The Court of Errors held, however, that the action might be sustained. The Chancellor, who delivered his opinion in favor of *reversal*, says: (p. 348,) "It is perfectly clear in this case, that the *plaintiff* stood in the place of a mere surety, for the amount due on the mortgage, his land being holden for the amount; and that the defendant, not only by the covenant in his deed, but also by his previous bond of indemnity to Wheeler, was in fact the real debtor. If a mere surety, whether by actual contract or operation of law, is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against

the other, who was in fact the principal debtor. Assumpsit he holds, is therefore an appropriate remedy.

Judgment *reversed* unanimously, 17 to 0.

ATTACHMENT OF VESSEL.

RING v. GIBBS and others, 26 Wend. 502, 510.

Not reported in S. Ct. Opinion of Cowen, J., given 26 Wend. 505.

Attachment of Vessel ; Bond under Statute to release.

DEBT on bond in New York Common Pleas, the condition of which was, that if the said W. C. G. and C. V. S. K., (obligors and defendants below,) *should pay all such demands as shall be established to have been subsisting liens upon the vessel, &c., pursuant to the provisions of the eighth title, 8 Ch. third part of Rev. Stat.*; then the obligation was to be void; otherwise, &c. The plaintiffs after setting out the bond and condition, aver that \$269, for work and labor and material furnished the ship, was due to them at the execution of the bond, and was a subsisting lien on her, &c., and assign non-payment of it as a breach of the condition. Defendant K., alone brought in, pleaded *non est factum*. An *oyer* appeared upon the record, but *oyer* had not been craved, and was not enrolled. The jury found the facts as alleged in the declaration, and assessed \$269 damages. On error to the Supreme Court, that court held that the condition of the bond "exacted too much from the defendants, as it *bound them to pay all subsisting liens indiscriminately*; whereas the statute with great propriety, ties up the condition to those *duly exhibited before the judicial officer*;" p. 506. It is also held, in the opinion of the Supreme Court, that the declaration is bad, in not alleging a *request*, pursuant to the provisions of the 16th sect. of the statute. The court reversed the judgment of the Common

Pleas, for these reasons; and now on writ of error to the Court of Errors, after the argument was closed,

The court held, that the *bond* was not a bond to the officer who had the warrant, taken *colore officii*, but to the parties who sued out the warrant; that the variance from the terms of the statute, in the condition, did not render the bond void, though broader than could have been required by the obligors, but the obligors could not now complain that they had bound themselves to do what had not been required of them. The defects in the declaration were held cured by the verdict, and the judgment of the Supreme Court was *reversed*, and that of the Common Pleas affirmed, by an unanimous vote, 22 being present.

ATTORNEY AND SOLICITOR.

NICOLL and others, appellants, *v.* NICOLL, respondent, 16 Wend. 446.

Attorney's Lien for Costs.

THE Court of Errors, in this case held, that an attorney's lien for his costs is no bar to a *bill in chancery*, filed to obtain a set off against the client; nor is it a bar when the question arises on a *trial at law*. The decree of the Chancellor sustaining the lien was therefore *reversed*. 13 for reversal, 8 for affirmation.

BAIL IN ERROR.

BOYD v. WEEKS, 6 Hill, 71.

Bail in Error in Court of Errors ; Justification.

WHERE bail in error was excepted to, and the plaintiff in error put in and perfected new bail by justification. The Court of Errors held, that the court ought not to interfere, though the sureties had justified by a false affidavit, and were utterly insolvent.

The court held that the defendant in error should be left to his remedy, by application to a commissioner under the statute, (2 R. S. 59, Sec. 36,) for a *supersedeas*.

BAILMENT.

SEWALL v. ALLEN, 6 Wend. 335; 2 Wend. 327.

Bailment ; Common Carrier ; Steamboat Owner.

THIS was an action against the owners of a steamboat as common carriers, for the loss of a packet of *bank bills* delivered to the captain for carriage and delivery.

The Supreme Court held, that the owners of such a boat, carrying not only passengers, but light freight and parcels for hire, were common carriers, and answerable for all goods shipped on board their vessel, unless lost by inevitable accident or the enemies of the country. That an arrangement between the owners and the captain, allowing him the profits of carrying bank bills as a privilege does not discharge the owners, unless the shipper contracts with the captain himself, knowing that he receives the goods *on his own account*, as a part of his privilege, and not in his character of agent for the owners. That the instructions of the owners to the

captain not to carry money, did not excuse their liability unless notice of such instructions were brought home to the shipper. On error brought,

The Court of Errors held, that the defendants below were not liable for the loss of the bank bills entrusted to the master of one of their boats; it appearing that he had been forbidden by his employers to carry money; that he had never knowingly carried any; that the *usage* was for persons sending money to compensate the masters, and that the owners charged freight only on *specie*.

Judgment reversed, 15 to 6.

See *Bank of Orange v. Brown*, 3 Wend. 158; and *Orange County Bank v. Brown*, 9 id. 85.

VAN SANTVOORD and others v. ST. JOHN and TOUSEY, 6 Hill, 157.

In S. Ct. 25 Wend. 661.

Bailment; Common Carrier; Usage of Trade.

¶ An objection was taken, upon the opening of the argument in this case, that as the Supreme Court had reversed the judgment of the New York Common Pleas, and awarded a *venire de novo*, no writ of error would lie in this state of the proceedings. But

The Court of Errors held, that if the judgment of the Common Pleas was right, and the Supreme Court had erroneously reversed it, then notwithstanding the award of a *venire de novo*, the judgment of the Supreme Court should be reversed, and that of the Common Pleas restored, without waiting for a new trial; and that the writ of error was well brought.

THIS was an action to recover the value of a box of goods entrusted to the defendants for transportation. They were engaged in the carrying business on the Hudson river, by means of a line of towboats from New York to Albany, and were not interested in any transportation W. of Albany.

They received on board one of their towboats, from the plaintiffs, a box marked "J. P., Little Falls, Herkimer county," and gave a receipt for it in these words, "Received of J. and T. (the plaintiffs) on board the towboat, &c., (naming it,) a box of merchandize, marked J. P., Little Falls, Herkimer county." It did not appear that the plaintiffs gave any special directions as to the place where the box was to be delivered, nor as to the mode of delivery; but upon its arrival at Albany, the defendants delivered it safely on board a canal boat belonging to a responsible canal line, whose route lay through Little Falls, this being in accordance with the uniform usage in such cases; and before the canal boat reached Little Falls, the box was broken open and rifled of its contents.

On the trial of the cause in the Common Pleas, the judge allowed the defendants to give in evidence the common usage, as to goods sent by towboats, where there was no connection between them and the canal lines, nor any participation of profits, and charged the jury that the defendants had discharged their duty, if they had carried the goods safely to Albany, and then delivered them to a safe canal line. Upon exceptions and writ of error, the Supreme Court reversed the judgment of the Common Pleas, upon the ground that the general custom could not control the obligation of the contract which was on the face of it, to carry the box to Little Falls, unless the custom was brought home to the knowledge of the owner of the goods.

The Court of Errors reversed the judgment of the Supreme Court, holding that if the owner neglected to inform himself of the usage, it was his own fault, and the loss should fall upon him.

Judgment *reversed*, all the members present voting for reversal.

BILLS OF EXCHANGE AND PROMISSORY
NOTES.

SAFFORD v. WYCKOFF, President of the Farmer's Bank of
Seneca County, 4 Hill, 394.

In S. Ct. 1 Hill, 11.

General Banking Law ; Bill of Exchange by Bank.

ACTION against drawer and endorser of a bill of exchange as follows :

"Farmer's Bank of Seneca County,

At thirty days after date, pay to the order of Reuben D. Dodge three thousand dollars, and charge this institution.

J. J. Fenton, Cashier.

Romulus, August 15, 1338.

To

Walter Mead, Esq., Cashier N. Am. Trust and Banking Co., N. Y.

Endorsed—Pay to the order of Messrs K. and D. &c."

The objection was taken on the part of the Bank, at the trial, that it had no power to issue drafts on time or any other paper, except such as had been countersigned according to law. Objection overruled; exception, and verdict for plaintiff. On the motion for a new trial,

The Supreme Court held, that associations under the general banking law, have no authority to make bills of exchange, or to issue any negotiable paper, save under the sanction of the comptroller, and in the form prescribed by the statute; and that no action can be maintained against the bank or others who are parties to the paper so illegally issued, this appearing on its face. On error,

The Court of Errors held, that such a negotiable draft or bill in the ordinary form, would bind the bank in favor of a bona fide endorsee; and this, notwithstanding it be signed by the cashier only.

Otherwise it would seem, if it were issued by way of a *loan* or for the purpose of being put in circulation as *money*.

How far such association may, as incidental to their general powers by statute, issue negotiable paper not authorized by the comptroller, *e. g.*, for the payment of their debts, &c., was discussed and considered in this case, but not decided.

GIFFORD, President of the Farmer's Bank of Hudson, *v.*
LIVINGSTON, 2 Denio.

General Banking Law.

IN this case, the Court of Errors held, that the act entitled "An act to authorize the business of banking," passed April 18th, 1338, was constitutionally passed, although it did not receive the assent of *two thirds* of the members elected to each branch of the legislature, was a constitutional and valid act, and that the decision in the case of *Warner v. Beers*, to that effect is conclusive.

The case of *De Bow v. The People*, 1 Denio, 9, was expressly overruled by the Court of Errors in this case, and the judgment of the Supreme Court in the present instance reversed by 15 to 7.

BILLS OF EXCHANGE.

GRAVES *v.* DASH, 9 J. R. 17.

In S. Ct. 4 J. R. 119, 124.

Foreign Bill of Exchange.—Damages.

THIS was an action by Dash, against Graves, as first endorser of a bill of exchange drawn on a house at Liverpool, England. The rule of damages on the bill returned pro-

tested, was the only point in the case. On the trial, the defendant offered to prove that when the bill was returned, and at the time of issue joined in the cause, bills on England were 15 per cent. below par. The evidence was overruled, and the plaintiff had a verdict for the *amount of the bill*, and 20 per cent. damages. The Supreme Court, in conformity to its previous decision, in *Hendricks v. Franklin*, 4 J. R. 119, held the decision of the Judge correct as to the rule of damages on a foreign bill, and affirmed the verdict. On writ of error,

The Court of Errors reversed the judgment, holding that the rate of exchange on England at the *return of the bill*, was the proper rule of recovery, with 20 per cent. damages, and that the evidence to establish the rate of exchange on the return of the bill protested, should have been admitted.

Judgment *reversed*, overruling case of *Hendricks v. Franklin*, 4 J. R. 119.

BANK OF AMERICA v. WOODWORTH, 19 J. R. 390.

In S. Ct. 18 J. R. 315.

Promissory Note ; Demand and Notice.

THE Supreme Court held, in this case, that where the maker of a note endorsed by the defendant for the maker's accommodation, wrote on the margin, "payable at the Bank of America," without the knowledge or consent of the endorser, the endorser was liable upon a demand on the maker, made at the bank, and notice to him of the default of payment. But

The Court of Errors held, the demand insufficient to charge the endorser, on the sole ground that the memorandum, made subsequent to his endorsement, had been put upon the note, without his knowledge or consent.

Judgment *reversed* accordingly.

ALLEN v. SUYDAM, 20 Wend. 321.

In S. Ct. 17 Wend. 370.

Bill of Exchange; Laches.

ERROR from Supreme Court. This was an action on the case for negligence in the collection of a draft, originally brought in the Superior Court of the city of New York, by Suydam and Boyd, against the Allens, brokers and collecting agents. The draft was drawn by J. Eastabrook, upon a firm at Concord, N. H., in favor of plaintiffs, for \$616 89 $\frac{1}{2}$, dated July 23, 1833, and payable two months *after date*. The plaintiffs received it on the 16th of August, and same day handed it to defendants for collection, who were to receive a commission of one per cent. On the 2d of September, they sent it to a cashier of a bank at Concord, who received it on the 6th, and presented it for acceptance on the 7th, when the drawers told him that they were not ready to accept, as they had no instructions, but expected to have in a short time. On the tenth, he called again with the draft, and they answered him that they had received instructions not to accept the bill, which was the same day protested and returned to the defendants, who received it on the 16th, and the same day sent it to the plaintiffs, asking for a receipt they had given for it, which was refused to be given up, and on the 19th, refused to give any instructions to defendants, as to sending the draft back to be protested for non-payment. On the 9th October, the drawer died insolvent. When the draft was drawn, he had funds in the hands of drawers, though what amount does not appear. The drawers testified also that the delay in the presentment made no difference in their action, as they never accepted without previous advice. It also appeared that the drawers had paid drafts drawn by the same party subsequent to the 16th August, amounting in all to \$2,000. On the other hand, it was shown that the draft in question had been given to the plaintiffs, to take up a note of drawer's due to them, which had been protested at Concord for non-payment, and remaining under protest until this draft was substituted for it.

The Supreme Court held, that the laches of the agents,

in forwarding the draft for *acceptance*, made them liable for this neglect; and that the amount of the draft was, in the absence of any other proof in the case, the *rule of damages*.

The Supreme Court held, "that although as between the payer and drawer of a bill of exchange, the remedy of the former against the latter, is not affected by the omission to make presentment for acceptance, if a bill payable a given number of days after *date*, provided it be made at the maturity of the bill; yet the same rule does not prevail as between the payee and agent who undertakes to collect the bill. The agent is bound to present the bill for acceptance, *forthwith*; and if not accepted, to give notice thereof to his principal, and if he neglect to do so, he becomes responsible in damages.

They also held, the court below right in their rule of damages, although the opinion of the court, given by Cowen, J., says that if there were anything in mitigation of damages, it should have been put to the jury. But he says he can not discover any such ground.

The Court of Errors, *affirming* the liability of the defendants, *reversed* the judgment of the Supreme Court, on the ground that the plaintiffs were entitled only to the *damages actually sustained*. Those under the circumstances would seem to be merely nominal. The rule for judgment of *reversal* was adopted in the following terms:—

"*It is adjudged, &c.*, that an agent who receives a bill for *collection*, which has not been accepted, is bound to present the same for acceptance, without any unreasonable delay, as well as to present the same for payment when it becomes due, or he will be liable to his principal for the damages which the latter sustains by such negligence."

Judgment *reversed*, 20 to 4.

ALLEN v. THE MERCHANTS BANK of the City of New
York, 22 Wend. 215.

In S. Ct. 15 Wend. 486, *et seq.*

Agent ; Laches ; Bill of Exchange.

THIS case was first decided by the Superior Court of N. Y., in favor of the defendants, upon the following facts.

The defendants received from plaintiff for collection, a bill of exchange on Philadelphia, payable five days *after date*, which they transmitted to the Philadelphia Bank. On the 28th of June, (the bill being dated the 26th,) the bank delivered the bill to their notary, who the same day presented it for acceptance, which was refused, but the notary omitted to give notice to the endorers of the *non-acceptance*. On the third of July, the bill was protested for non-payment, and notices sent to the Merchants Bank, under cover, directed to the parties to the bill. On the 6th, the holders received their notice, and gave notice on the 7th to the other endorser. The plaintiffs having failed in their suit against him for want of notice of non-acceptance, this suit was commenced against the bank to recover the amount of the bill and their damages. It was proved on the part of the defendants, that by the law-merchant of Pennsylvania, it was not necessary to present the bill for acceptance, and to give notice of non-acceptance, but that it was sufficient to present it at maturity for payment.

The Supreme Court affirmed the decision of the Superior Court, holding that in the absence of any special agreement, or established usage, the Merchants Bank was not liable for the negligence of the bank or its notary in Philadelphia.

The Court of Errors held the contrary, and adopted the following resolution as their decision in the case.

“Resolved, that when a bank or *broker* or other money dealer, receives upon a good consideration, a note or bill for collection, in the place where such bank, broker, or dealer, carries on business, or at a *distant place* the party receiving the same for collection, is liable for the *neglect, omission, or other misconduct* of the bank or agent to whom the note or bill

is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, expressed or implied."

Judgment *reversed*, by a vote of 14 to 10.

✍ The reporter who seems dissatisfied with this decision, calls attention to the case, of *East Haddam Bank v. Scovil*, 12 Conn. R. 303, as concurring with the decision of the Supreme Court, and the opinion of the Chancellor, in this case. There, the acceptor was a bankrupt, and the judge left the question of default or negligence to the jury, and whether the holder had been prevented from collecting or recovering the amount of the bill, by reason of any negligence or default on the part of the plaintiffs; and the jury found he had not.

In *Allen v. Suydam*, the court adopted the same rule of damages. 20 Wend. 321.

See *Smith v. Bank of Orleans*, 7 Hill, 595, note of reporter; and same case, 3 Hill, 561. "The case," says the reporter, "was *reversed* but on points not appearing upon the bill of exceptions, but raised by the pleadings, so that the decision in 3 Hill, 561, has still the force of a precedent."

In that case, Nelson Ch. J., says that "the case of *Allen v. Merchants Bank*, proves only that the holder may resort to either, (the agent at home or abroad.) It has not yet been decided that the relation of principal and agent does not exist between the holder and the foreign agent; or that the former may not resort directly to the latter for negligence in charging the parties."

REMER v. DOWNER, 23 Wend. 620.

Reported 21 Wend. 10.

Promissory Note; Notice to Endorser.

THE Supreme Court held in this case, (overruling the case of *Cuyler v. Nellis*, 4 Wend. 348,) that a notice of protest

sent by mail, directed to the *town* where the party resides, is sufficient, although there be several post-offices in the same town, unless it appears that the holder knew that it should be directed in a different manner, (as now by statute passed since this case occurred,) unless the party when affixing his signature to a bill or note, specify thereon the *post-office* to which notice must be addressed.

That court also held, that where the sum specified in the notice of protest, *varies* from the true amount of the note, it is for the jury to say whether the party has or has not been misled; and gave judgment for plaintiff.

The Court of Errors, however, the Chancellor delivering the only opinion, *reversed* the judgment; he concurring with the Supreme Court in overruling *Cuyler v. Nellis*, but holding that the *misdescription* of the amount of the note, in the notice of protest, the notice informing the defendant that "Your note for \$999 52 endorsed by him (P. the cashier who sent it) "was protested," &c.; instead of note for \$560, payable to Whitaker and endorsed to him, was fatal, and that the question was one of *law* for the judge at the circuit, and should not have been left to the jury. He however intimated his opinion that the *misdirection* of the letter on the *inside*, to the cashier, would have been cured by the correct address on the outside, if it had not been for the *misdescription* of the note.

But in 25 Wend, 277, the reporter has published Senator Verplanck's opinion in this case, in favor of a *reversal*, but holding that the question as to misdescription of the note, should have been left to the jury; and the reporter adds a note, claiming that the question of the tribunal whose province it was to decide upon the sufficiency of the notice, may be considered as *open*, notwithstanding the reversal of the judgment. *Sed quere?*

HALL v. NEWCOMB, 7 Hill, 416.

In S Ct. 3 Hill, 234.

Promissory Note; Endorser; Guaranty.

THE judgment in this case was *affirmed*, the Court of Errors holding with the Supreme Court, that the plaintiff was properly non suited in the court below. But as the cases of *Herrick v. Carman*, (12 J. R. 159,) and *Tillman v. Wheeler*, (17 id. 176,) are *commented on and explained*, and that of *Nelson v. Dubois*, (13 id. 175,) overruled by it, we have thought proper to call the attention of the reader to the case.

The plaintiff declared against the defendant, in one count as *maker*, and in another as *guarantor* of a promissory note as follows: "New York, April 23d, 1840. On demand, I promise to pay to Samuel Hall or his order two hundred and fifty dollars for value received, with interest, until paid. (Signed.) Peter Farmer." Newcomb endorsed the note in blank, knowing that the maker was to get the money on it from Hall the plaintiff, but no demand was ever made upon the maker for payment of the note. Upon this evidence a non suit was ordered, on the ground that demand and notice were necessary to charge the endorser. The Supreme Court affirmed the decision, and now,

The Court of Errors also affirmed the non suit, on the ground that such an endorsement merely engaged the endorser upon the usual conditions of demand and notice, and that parol evidence was inadmissible to vary the legal effect of his undertaking, and that he could not be made liable to H. as *guarantor* or *maker*, but only as endorser.

✍ The case of *Nelson v. Dubois*, overruled, as it seems to be, by this decision of the Court of Errors, was an action upon a promissory note, payable to bearer, and endorsed in blank, in which the Supreme Court held, that the holder may in such a case, or in the case of a note not negotiable, write over the name of the endorser a guaranty or promise to pay the note, so as to take the case out of the statute

of frauds ; and that this may be done at any time before or at the trial of the cause. (13 J. R. 175.)

In that case, it was also held, that a declaration or a promise, (by parol,) might be supported by a promise in writing, if it comported with the promise stated.

SUYDAM and JACKSON *v.* WESTFALL and others, 2 Denio,
205, 220.

In S. Ct. 4 Hill, 211.

Bill of Exchange ; Surety.

THE plaintiffs in error brought *assumpsit*, in the court below against the partners of the firm of Norton, Bartle and McNeil and the defendant Westfall, to recover the amount of a bill of exchange, drawn by them upon the plaintiffs, which the latter accepted, and paid at maturity. The bill was in these words:—

Phelps, July 1, 1839.

Messrs. Suydam, Sage, and Co.

Four months after
date, please to pay to the order of C. A Cook, cashier, one
thousand dollars for value received, and charge to the ac-
count of Your obedient servants,

Norton, Bartle, and McNeil.
Albert Westfall.

On the first trial, the circuit judge charged that the defendant Westfall was liable as a *drawer* of an accommodation bill to refund to the drawee, who had accepted it without funds. A verdict being found for the plaintiffs, on a bill of exceptions,

The Supreme Court granted a new trial, on the ground that the acceptance being made with the knowledge, that as Westfall, one of the drawers, signed merely as surety, he was not liable to the acceptors as drawer, whether the relations of drawers among themselves, appear upon the face of the bill or not.

A new trial being had, the judge charged the jury accord-

ing to the opinion of the Supreme Court, that if they should find that Westfall became a party to the bill, as the surety of Norton, Bartle and M'Neil, the other drawers, and had no interest in the bill, and no part of the proceeds went to his use, in that case the law implied no contract on his part to refund the amount to the plaintiffs, and that the jury in that event ought to find for the defendant. Exceptions. Verdict for defendant.

The Supreme Court adhering to their former decision; on writ of error,

The Court of Errors held, that although Westfall joined as a drawer in the bill as a *surety* only for the others who procured the bill to be discounted before acceptance for their own benefit; and the drawees, with knowledge of these facts, accepted and paid the bill without funds of any of the drawers in their hands, yet that they were entitled to recover the amount against *all the drawers*, in an action for money paid to their use.

Judgment of the Supreme Court *reversed* by 10 to 6.

CANAL APPRAISERS AND CANAL COMMISSIONERS.

THE CANAL APPRAISERS *v.* THE PEOPLE *ex rel.* TIBBETS, 17 Wend. 571.

Error from S. Ct. 13 Wend. 355 to 373. Decided Dec. 1836, in Ct. of Err.

JANUARY, 1835, In Supreme Court. The Supreme Court held, that 1. "The proprietors of *islands*, separated by a stream in which the tide does not ebb and flow, own respectively to the centre of the stream unless the language of the *grants under which the islands are held, is such as clearly and unequivocally to show that the intent of the parties was that the grant should not extend beyond the water's edge.* 2. When the stream is navigable for either boats or rafts, the *public* have a right to use it for those purposes and

the rights of the adjoining proprietors are subject to the *public easement*; but the *state* can not divert the water of the stream, or interfere with it in any other manner, which will render it less useful to the proprietors of the adjacent shores.

"If in the improvement of a *navigable river by the state* by the erection of a dam, a *waterfall* in a tributary stream not *navigable*, belonging to an *individual*, is overflowed and *destroyed*, such individual, both within the meaning and spirit of the *constitution* and the *canal laws*, is entitled to compensation for the injury sustained, equally as if his property had been taken for the public use.

"Grants by the Legislature of *islands, in rivers and streams, where the tide does not ebb and flow*, although made during a long series of years, will not justify the conclusion *that the principle of the common law has not been adopted* here; that grants of land bounded on rivers and streams where the tide does not ebb or flow, carry the exclusive rights to the middle of the stream; or having been adopted, that it has ever been abrogated or exploded."

This was an application for a mandamus to the canal appraisers, to compel them to allow the relator damages for the destruction of a waterfall belonging to him, situated in the *middle* sprout of the Mohawk river, near the *junction* of the Erie and Champlain canals, by the erection of a dam across the *Hudson* river at the sloop lock, between Troy and Lansingburg. A peremptory mandamus having been issued, the appraisers sued out a writ of errors and the Court of Errors *reversed* the judgment of the Supreme Court, on the ground that the relator had not shown title in himself to the *locus in quo*; but leave was given him to *traverse* the return, so as to give him an opportunity to prove his title.

See 5 Wend. 423 to 474, in Court of Errors.

There seems to have been some question, partly of law and of fact, as to the actual location of the grant under which the relator claimed, which involved no important principle.

The Supreme Court holding that the relator was entitled

to the south half of the *middle sprout*, the appraisers brought this writ of error.

In the course of the trial before the circuit judge, the acts of the legislature, (incorporated into the return, as it would appear,) granting a large number of islands, &c., were introduced in evidence, to show what the *law of the state was*, and that the legislature as evidenced by these private acts, had rejected or abrogated the common law rule with regard to riparian owners, &c. The Chancellor in his opinion, very justly, though severely, characterizes this mode of establishing the law of the land. He says—p. 602 :

“These acts of recent legislation are very little to be relied on to prove what our common law was one hundred and fifty years ago. Indeed the whole of these legislative acts and supposed conflicting grants, which were introduced into the return of the defendants below, merely by way of argument, or for the purpose of informing *the Supreme Court what the law was*, were improper as *evidence* for the consideration of the jury, as in civil cases the jury are to decide matters of fact merely, and the court is the proper tribunal to settle the law.”—“Indeed it would present a new and striking instance of the glorious uncertainty of the law, if the legal construction of all our titles to real estate was to be settled by the verdict of a jury, and upon such *evidence of the law* as has been produced by both parties in this case.”

✍ As well for this reason, as others assigned by the Chancellor, he was for affirming the judgment of the Supreme Court. But *aliter Dis visum*; and the judgment of the Supreme Court was reversed.

The Senators who delivered opinions in favor of *reversal* were Beardsley and Tracy; and it is to be sincerely regretted, for the credit of our jurisprudence, that their unsatisfactory reasoning or apparent exercise of legislative power, to *enact* the law, should have prevailed over the sound reasoning and clear legal principles of the Chancellor's opinion.

¶ The marginal note of the reporter in this case is as follows :

"If in the *improvement of the navigation* of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be *generally navigable*, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the *canal laws* directing compensation to be made for private property taken for public use."

¶ See case of the *Commissioners of Canal Fund v. Kempshall*, where compensation was allowed for obstructing a race course in the Genesee river, at Rochester, and on writ of error to the Supreme Court, *affirmed* by the Court of Errors, 26 Wend. 404; also, *Child v. Starr* and others, 4 Hill 369. S. C. in S. Ct. 20 Wend. 149.

LYON v. JEROME, 26 Wend. 485, 501.

In S. Ct. 15 Wend. 570.

Canal Commissioner; Delegated Powers; Constitutional Law.

LYON sued Jerome in trespass for taking a quantity of stone from his quarry, for the construction of locks on the Oswego Canal. Jerome justified as *chief engineer* in the construction of the canal, under the statutes relating to the state canals. The stone was taken by his direction. The *canal commissioner* who had charge of the work, and who testified on the trial, saw it while in progress, but gave no direction to take the stone in question; the contractors, he stated, were authorized to take stone from a tract of land belonging to the state, adjoining plaintiff's quarry, or from the bed of the canal, but not from the plaintiff's quarry, but said if the engineer had represented that it was indispensable to use the stone of the plaintiff, he should have sanctioned the taking of them. The plaintiff produced in evidence a certificate of the defendant of the quantity taken, and stating that he had taken it supposing the quarry was on the state

lands. The plaintiff offered to prove that the canal appraisers had refused to make him any allowance for his stone taken; which was objected to and rejected. A verdict for plaintiff being found for \$174, the defendant moved the Supreme Court for a new trial, which was granted.

The Circuit Judge on the new trial, nonsuited the plaintiff, and the Supreme Court having refused to set the nonsuit aside, a writ of error was brought to this court, and after full argument,

The Court of Errors held, that the authority of the *canal commissioners*, under the canal statutes, to enter upon and take possession of the lands, &c., of individuals for the construction of a canal, can only be executed by *them, in person*, or under their *express direction*; and that an *engineer* or any other sub-agent of the state, can not lawfully exercise such power but by the *express direction* of the canal commissioners or one of them, although such engineer or other sub-agent has been entrusted with the superintendence of the canal in the vicinity of the premises entered upon.

On this ground the judgment was reversed, but the Chancellor who voted to reverse on this ground, added: "I have serious doubts also as to the constitutionality of the acts of the legislature under which the property of the plaintiff was taken, no provision having been made whereby the owner of the property might *compel* the payment of his damages, or ensure the compensation to which he was entitled." After some remarks upon the law as it stood by the former *canal acts*, until a subsequent provision was made for such cases, by the Rev. Stat., he says: "I held in *Bloodgood v. The Mohawk and Hudson R. R. Co.*, 18 Wend. 17, and am still of the same opinion, that before the state can enter upon and occupy, destroy or materially injure the private property of an individual, except in cases of actual necessity, which will not admit of delay, an adequate and certain remedy must be provided, whereby the owner of such property may compel the payment of his damages or compensation. No such provision being made in the act of 1847, nor in the act for the construction of the Oswego canal, I am inclined on this ground also to reverse the judgment."

With this opinion Senator Verplanck also declared himself inclined to concur, but thought it better not to express any opinion on the point, as the constitutional point had not been raised at the trial or in the Supreme Court, and objected to any judicial expression of opinion on that ground.

Judgment of Supreme Court *reversed* unanimously.

WAGGONER v. JERMAIN, 7 Hill, 357.

Reported 1 Hill, 279.

Canal Commissioners ; Action on the Case.

THE canal commissioners under the act for the construction of the Crooked Lake canal, caused surveys, &c., to be made and then adopted a plan, as required by the act, preliminary to commencing the work ; but the plan had no reference to the mill-dam of the defendant below, which was at the outlet of the lake. Afterward, however, the commissioners by way of *substitute* for certain regulating gates contemplated by the original plan, permitted the defendants below to increase the height of their dam ten inches, in order to effect the same object for which the regulating gates were designed ; by this increased height of the dam, the lands of the plaintiff below, lying above the dam, were overflowed and injured ; for which injury he brought this action on the case.

The Supreme Court held that the defendant could not justify under the authority of the canal commissioners ; that the powers conferred on the commissioners were *quasi* judicial, in respect to the adoption of the plan mentioned, and having once passed upon the question, and determined what the plan should be, their jurisdiction was at an end ; and therefore any departure from it, injuriously affecting a third person, formed a ground for recovery of damages ; 2. That the rule protecting one for acts done by *judicial* authority, did not apply, because the jurisdiction of the canal commissioners, was limited to a single act, and because *functus officio* on its performance. 3. That it was defensible as a necessary act of *extraordinary repair*

under the statute on that subject, nor within the statute relating to *ordinary repairs*.'

The Court of Errors *reversed* the judgment, holding that as the canal commissioners authorized the defendants to raise their dam, *for canal purposes*, the consequential injury, if any, ought not to be charged upon the defendants.

Judgment *reversed*, 11 to 9.

MUNSELL v. LEWIS, 2 Denio, 224.

In S. Ct. 4 Hill, 635.

Canal Commissioners and Canal Contractors ; Assumpsit.

THE defendant below, and another person, in November, 1834, contracted with the canal commissioners to perform certain work on the Chenango canal, by October, 1836; and having commenced the work, they, in January, 1836, assigned their contract to the plaintiff, who agreed to finish the job at his own expense, for the price stipulated in the original contract; which upon his completion of the work, were paid to him. In April, 1836, an act was passed, providing for extra allowances to the *contractors* on this canal, (Laws, 1836, p. 201,) to be made by the canal commissioners on good cause shown to them, &c.; under which an award was made in favor of the original contractors in this case, and one half of the sum awarded was paid to the defendant in this suit, as one of the contractors provided for in the act. After the receipt of the money by him, the plaintiff brought his action for money had and received to his use; claiming to be the party beneficially interested in the grant or donation made by the Legislature to the contractors, and that the defendant received the amount awarded merely as his trustee.

The Supreme Court held, that the action could not be sustained; that there was nothing in the act but a mere legislative gratuity or donation to the contractors, and that the plaintiff being merely a *sub-contractor*, had no legal or equitable right to the sum awarded. On writ of error,

The Court of Errors held, that the plaintiff having com-

pleted the job, was entitled to be substituted in the place of the *contractor*, and that the award of the canal commissioners in favor of the defendant's claim, as one of the contractors, did not settle who was entitled to the money, as between them and their sub-contractor; that the plaintiff was entitled to the money, and could recover it in an action of assumpsit for money had and received to his use.

✍ This seems to have been a decision made upon some facts or considerations *dehors* the record, and the case as there presented. It might, perhaps, be sustained upon principle, if the original contractors had, upon the assignment of their contract to the plaintiff, procured him to be accepted in their place, and had been themselves discharged by the canal commissioners. Nothing whatever of this kind was done. The canal commissioners never recognized any such substitution, nor were they in any manner parties to the arrangement. In awarding the damages to the defendant and his associate, they exercised the discretion which the act gave them, and whether the plaintiff made any claim or not, their award would appear to have been final, and not subject to any direct review by any judicial tribunal whatever. If they had refused to award to the original contractors, there was no appeal provided for. And if upon the claim of the *sub-contractor* they had rejected that also, *he* would have been equally without appeal. In every point of view, then the decision of the Supreme Court seems to have been in conformity to the law, as well as the equity of the case. This case seems therefore to be entitled to rank with that class of decisions, happily rare, where the court has overlooked the distinction between its judicial and its legislative functions, and has passed a *law* for the relief of the party, instead of deciding the mere forensic question presented to it.

The act *of relief or judgment of reversal*, passed by a vote of 13 to 6.

CHANCERY.

LE ROY and others v. VEEDER and others, 1 J. C. 417-429.

S. C. Caines C. E. p. 1.

Discovery ; Relief ; Demurrer.

THE appellants (complainants below) exhibited their bill in Chancery against the respondents and 16 other defendants, in which they set forth that Governor Sir Henry Moore, on the 2d of February, 1768, purchased of the native Indians, a tract of land containing 25,000 acres, then in the county of Albany, now in the county of Montgomery, for the use of Peter Lewis, and about 25 others, named in the bill ; who thereupon petitioned for a patent, which issued to them accordingly, on the 28th February, thereafter ; that in consideration of money, (and other valuable consideration not known to the plaintiffs,) paid or delivered or performed by the late Sir William Johnson, of the said county, to the petitioners, and as he agreed to pay all fees, &c., for the patent, it was agreed between him and the petitioners, that when the patent should be made to them, they would receive it in trust for him, and when the title should become vested in them, that they would convey to him ; that he accordingly paid the fees, £600 ; that in pursuance of the agreement, when the title became vested in the patentees, they did convey to him in fee simple the whole 25,000 acres ; that Sir William took possession of the whole in a short time after the conveyance, caused it to be surveyed, and the bounds designated by marking trees, &c. That Sir William, on the 11th of June, 1772, for £375, conveyed 10,000 acres of it to Lord A. Gordon, the boundary line of which appears to have been according to a survey made for that purpose ; that soon after, Sir W. conveyed another parcel containing 2,000 acres to John Kelly ; that by his will of the 27th of January, 1774, he devised the remaining 13,000 acres to his two brothers and four sisters, and directed his executors to sell the same, and the moneys to be equally divided between the devisees ; and shortly after

he died. That Lord A Gordon, on the 27th of May, 1787, conveyed the tract of 10,000 acres to R. and J. Watts, who on the 5th of December, 1792, conveyed it to the complainants, Le Roy and Bayard, for £5,000; that R. and J. Watts, as attorney to the executors of Sir William Johnson on the 13th of November, 1792, conveyed the tract of 13,000 acres to the same complainants, and that the third of the lands was afterward vested in the complainant Boon.

The bill then stated that in the early part of the late war with Great Britain, Sir John Johnson, the son and one of the executors of Sir William, buried in the earth sundry title deeds and papers, and among them the deeds, &c., of the 25,000 acres, for the purpose of guarding against their loss, &c., where they remained several years: but when taken up, were so injured and defaced, as to be altogether illegible; and these conveyances of the lands, were by these means, *either lost or destroyed*, or by some other accident, are now wholly out of the power of the complainants to produce; that nine of the defendants in the bill, and the other twenty-one defendants confederating with them, intending to avail themselves of the loss or destruction of the conveyances to Sir William, and pretending that they claimed title under sales to them by the original patentees, or persons deriving title from them, had commenced a suit in ejectment against Boon, in the Supreme Court, he being the only one of the defendants residing on the lands; and that the defendants had no such title as they pretended. The bill prayed that the defendants might answer and discover and set forth their title, and whether the persons under whom they claim title, were ever in possession of the land; that the lessor in ejectment be enjoined from proceeding, and that complainants be quieted in their possession, and for further relief.

Boon was the only complainant who made the affidavit annexed to the bill, which it substantially verified. That part of it relating to the deeds from the patentees to Sir. W., and the destruction of them was as follows:—

“And the said deponent has been informed and verily believes and hopes to prove that the deeds (in question) did

exist and were lost in the manner mentioned in the bill." There was no affidavit by the other two complainants.

To this bill some of the defendants answered, but fourteen of them, (the respondents in this appeal), separately filed general demurrers, and set forth as causes of demurrer :

1. That all the complainants had not verified their bill, and the facts stated as to the loss of deeds, &c.

2. That the agreement between Sir William and the patentees, thus to obtain a patent to the use of Sir William, was illegal, it being in fraud of, and in contravention of the instruction from the king to the governor, not to grant patents of land exceeding 1,000 acres to each patentee.

3. That the bill charging that defendants hold under a conveyance to them by some person having a pretended title to the land, and praying a discovery, the defendants, if the charge is true, would be subject to a grievous penalty.

4. That the bill is filed to discover the defendant's title, and to quiet the complainants in their possession, before the complainants have established their title at law.

5. That the complainants' title set forth in the bill, is matter merely triable at law, and may be tried in the ejectments brought by the defendants.

6. That the bill contains no equity.

The Chancellor, Livingston, allowed all the demurrers and dismissed the bill with costs. On appeal

The Court of Errors held, Benson, J., delivering the opinion of the court, that the demurrers must be overruled.

1. That the affidavit of Boon verifying the bill, was sufficient.

2. That whether the agreement between Sir William and the patentees was illegal or not, from being obtained for his use, against the royal instruction, (which was not decided), yet to avoid a *discovery* upon the ground set up by the defendants, that a discovery might subject them to a penalty for buying a pretended title, it must appear by plea or answer, that the defendants would be subjected to such penalties.

3. That if a complainant be properly before the court for a discovery, and at the same time prays relief, a general demurrer to the bill for want of equity is bad, unless it is clear

on the face of the bill, that no *discovery* or *proof* can make the case stated in it a proper subject of equitable jurisdiction and cognizance.

4. That where several defendants in Chancery put in separate demurrers, on which separate decrees were given, the Court of Errors may, on reversal of those decrees, oblige each respondent to pay to the appellants their *costs, on each respective decree so reversed*.*

Decree accordingly *reversed*; and the decree of reversal ordered the respondents severally to pay the appellants thirty dollars for their *costs on this appeal*, in respect to each decree reversed, &c.

* See *Le Guen v. Kemble*, *post*.

WILLIAM LAIGHT, JOHN JACOB ASTOR, and PETER SMITH,
appellants, *v.* JOHN MORGAN, impleaded with J. D. and 33
other defendants; 1 J. C. 429-436.

S. C. 2 Caines C. E. 344.

Discovery; Relief; General Demurrer.

THIS was a bill by the appellants, complainants below, substantially similar to the foregoing, setting forth a title to a part of the same lands, under the executors of Sir William Johnson, and stating the same facts in relation to the loss or destruction of the deeds, and setting forth that defendants Morgan, &c., the complainants had commenced two actions of ejectment against two of the defendants, which were at issue. That many of the witnesses were old, infirm, &c., and lived out of the state, &c., and not likely to live long. The bill prayed that the complainants might be quieted in their possession, and that they might have their witnesses examined, in order to perpetuate their testimony, and that they might be otherwise relieved, as the nature of their case might require.

To this bill, Morgan, and each of the other defendants demurred separately, assigning the same causes of demurrer:—

1, 2. Because there was no affidavit that the deeds were not in the complainants' power, of which they sought a dis-

covery, nor of the age of the witnesses, whose testimony was wanted.

3. Because the prayer to perpetuate testimony, and for general relief, could not be joined in the same bill.

4. Because it appeared by the bill that the parties executing the releases and conveyances to Sir William Johnson, were out of possession, and their deeds therefore void.

5. Because it charges the defendants with holding under persons having a pretended title, and a discovery would therefore subject them to a penalty.

6. Because the complainants had not established their title at law, before coming to be quieted in their possession by a court of equity.

7. That the matter of the complainants' title is triable at law, &c.

The Chancellor, as in the preceding case, allowed the demurrers of all the defendants and made the same decree as to costs as in the preceding case. On appeal to this court,

The Court of Errors, Kent, J., delivering the opinion of the court, reversed the decree.

Kent, J. The bill appears to have had three objects.

1. To obtain a discovery of facts from the defendants.
2. To perpetuate the testimony.
3. To obtain specific relief.

Upon the demurrer to the whole bill, seven causes were assigned.

He then states that : "the three last were assigned in the same words in the similar case of *Leroy v. Veeder*, decided at the last session of this court, and by that decision are to be deemed as overruled. The fourth cause of demurrer was abandoned by the counsel for the respondents, upon this argument, as untenable. If the third cause be not equally so, it is perhaps not material in the present case, since, as I shall presently show, the decision of this cause finally depends upon this single point, viz. ; If *any part* of the bill requires an answer, is a demurrer to the bill good ?"

1. He then considers to what objects, if any in the bill, an affidavit was necessary ; and 2. If not for every object, whether the demurrer to the whole bill, for want of such affidavits, was maintainable. He shows that in respect to one

object—the discovery—the bill did not require an affidavit, and in respect to the other two, viz., the examination of witnesses and the relief, it did require one; and then whether for the want of an affidavit to such parts, a demurrer to the whole bill, was maintainable, and he holds that it was not.

The Court was *unanimously* of that opinion and the same decree of *reversal* was made as in the foregoing case, *with costs of appeal to be taxed, &c.*

BEEBE v. BANK OF NEW YORK, 1 J. R. 529.

Not reported in Court below.

Practice ; Rival Equities.

IN this case the Court of Errors, on appeal from an interlocutory order of the Court of Chancery, granting a new trial, held, that although the Supreme Court had ordered a *vacatur* to be entered of a satisfaction of a judgment which had been paid to the original plaintiff, after an assignment of it, of which the defendant was ignorant at the time of paying, yet that a *junior judgment creditor*, who had lent his money and entered up a subsequent judgment on bond and warrant of attorney, while the satisfaction of the first judgment remained of record, should have the preference, and that the money collected on an execution issued on the first judgment by the assignee, after the *vacatur* should be paid over to the executors of the second judgment creditor.

The Court of Errors also held, that on such an appeal from an interlocutory order, or decree, the Court of Errors will, if the merits of the case be fully presented to them, take them into consideration and make a final decree.

(This latter point had been previously decided by this court in the cases of *Le Guen v. Gouverneur* and *Kemble*, 1 J. C. 436; and *Bush v. Livingston*, 2 Caines C. E. 56.)

The laches of the assignee of the first judgment in not giving immediate notice to the judgment debtor of the assignment to him, furnished a sufficient equity for postponing

his lien to that of the junior judgment creditor, who had lent his money, while the satisfaction of the judgment by the original judgment creditor was of record, and still in force.

CLUTE v. ROBINSON, 2 J. R. 595.

Assignment ; Mortgage ; Covenant.

THE assignee of a chose in action, takes it subject to all the equities between the original debtor or obligor, &c., and the creditor or obligor, &c., but not to any latent equity, residing in a third person.

Thus, where A. gave a bond to B. and took from him a defeasance, conditioned that the bond and mortgage should be given up and cancelled, if A. by a certain day should execute a deed to B., and B. afterward assigned the bond and mortgage to C.

The Court of Errors held, that C. took them subject to all the equity subsisting between A. and B., and liable to be defeated by a performance of the condition of defeasance, whether he had notice of it or not; and that the defeasance need not be recorded to make it effectual.

The conveyance of a title admitted to be doubtful, is not a good performance of a covenant to execute a good and sufficient deed. But if the covenantor have a perfect title at the time of the decree or the coming in of the master's report, it is sufficient, and he may be allowed then to perform his contract, and save the forfeiture of his bond on making compensation for the delay of performance. The rule of compensation is the interest on the bond, where one has been given, to be calculated up to such time as the court, under the circumstances, shall decree.

Decree of Chancellor *reversed* accordingly.

WILKES v. ROGERS, 5 J. R. 566.

Not reported in court below.

Practice ; Exceptions to Master's Report.

THE Court of Errors held, that an exception to the report of a master, the party objecting must specifically point out the error.

And they held, therefore, that where the court below had set aside a master's report upon matters to which exceptions were not taken, and required further proof, that the order was erroneous, and could not be made even in a case where infants were concerned, if they have a guardian to protect their rights, and the order was *reversed* accordingly.

WOODCOCK v. BENNETT, 1 Cow. 711.*Execution ; Sale under, Void or voidable ?*

BILL for specific performance, which it had been decreed by the Chancellor, the respondent Bennett, who filed the bill, was entitled to have.

This decree was reversed by the Court of Errors, Woodworth, J., delivering the opinion of the court, in which the following questions are disposed of, as the ground of reversal :—

1. Where one agrees to convey land by *quit-claim*, the agreement has reference to the title as it is at the time of agreement, not to one subsequently acquired. And if the covenantor had none at the time, there is nothing upon which a decree for a specific performance can operate ; and it would be inequitable to decree the conveyance of a title subsequently acquired.

2. Where there is a judgment against two joint debtors, and one dies before execution, the judgment may be enforced against the personal estate of the survivor, but not against his realty. Against the real estate, execution can not issue nor be enforced, without a *scire facias* against the survivor and the heirs, *terre tenants, &c.*, of the deceased, to show

why the money should not be levied of their respective lands, without mentioning goods. If it issue without a *scire facias* it is void, and may be set aside, and an innocent purchaser under it will not be protected.

It is thus void, and a sale under it, is a nullity, even as to the lands of the survivor.

Decree *reversed* accordingly.

McDONALD v. NEILSON, 2 Cow. 139.

In Ch. 6 J. C. R. 204-205.

Oppressive Sale under Execution.

APPEAL from decree of Chancellor Kent.

The respondent Neilson filed his bill in the court below, against the appellants, to set aside a bond and mortgage for \$2,500, executed by him to McDonald, upon the ground that these securities had been executed to avoid a forced, oppressive, and illegal sale of the respondent's property at a sheriff's sale, and the respondents were charged as parties to a fraudulent combination to oppress the respondent by the sacrifice of his property at a sheriff's sale, in order to indemnify themselves for certain debts against John Neilson, junior, a son of the respondent.

The Chancellor had decreed that the bond and mortgage of the complainant should be given up and cancelled, on payment of the amount due on the *fieri facias* with interest and costs.

The Court of Errors held, with the Chancellor:—

1. That a party charged as combining with others, in a fraud against which relief is sought, and who therefore is made a defendant, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants; his interest being contingent and uncertain, the objection goes to his credibility and not to his competency. But they held, on the other hand,

2. That where the mortgagor had been guilty of improper conduct, if not of fraud and chicanery, toward the plaintiff in the execution, and had before got possession of all his

son's property, and the securities being executed to settle a legal controversy, the respondent having the benefit of counsel, and the advice of his friends, and fully aware of his rights, and the arrangement reasonable in itself; that a court of equity would not interfere, notwithstanding the improper conduct of the sheriff's officer.

The decree of the Chancellor was accordingly *reversed* and ordered that the respondent's bill be dismissed without costs to either party as against the other.

SEYMOUR v. DELANCEY, 3 Cow. 445.

In Ch. 6 J. C. R. 222.

Imposition in Exchange of Lands.

THIS case, though involving some application of the principles on which courts of equity will decline to decree specific performance, where inadequacy of price alone, is the ground of the vendor's objection to a decree, turns so exclusively upon the different views taken by the Chancellor and a majority of the court, as to the *evidence* in the case, in respect to the inadequacy of price and the habits and fitness of vendor to transact business at the time of the contract for the exchange of lands, which was the subject matter of the suit, that it is thought that this general reference to its nature will be sufficient.

The decree of Chancellor refusing to decree specific performance was *reversed*, 14 to 10.

WHELAN v. WHELAN, 3 Cow. 537.

Not reported below.

Fraud and Undue Influence.

I. As between child and parent.

II. As to representation, consideration, confidence.

Whelan, a man of 74 years of age, owning a considerable real estate, the father of 7 children, and whose wife was

sickly and irritable, was troubled for several years, with dissensions in his family about the management of his property, his wife taking part with all his children, except W. and J., two of his sons, who took part with him : and the dissension ran so high, that the mother and the children who took part with her, departed, leaving W. and his two sons W. and J., in possession of the property, the management of which was confided by the father to them, as it had been for some time before the family was broken up. Whelan was credulous, and easily led by William, and shortly after his wife left him, he was sued in a justice's court for her board ; and on asking William's advice, William told him, that if he intended to give him anything, he wished he would do it ; that as he and his mother were conducting, he would soon have nothing to give. Whelan's fears being alarmed by a belief that his wife would dissipate his property, in order to place it beyond the reach of debts which she might contract, he was induced to convey most of his real and personal estate to these two sons in fee, amounting to more than \$9,000, and a farm, &c., to William, in trust for another son ; but which trust was by parol only. Though he had before declared an intention to give all his estate to William and J. by way of advancement ; and though they executed to him a bond and mortgage to secure his and his wife's maintenance, and \$50 a year during their lives ; yet *held*, that the conveyance, executed under such circumstances, was void, as being caused by fraud, undue influence, and unfounded alarm, excited or countenanced by William, and being also for an inadequate consideration ; and though J. might have had no part in bringing it about, yet held that it was void also as to him.

2. Held also, that to warrant relief for any cause in a court of equity, (*e. g.* for undue influence in procuring a conveyance,) it must be stated in the bill ; but the charge need not be direct ; it is sufficient if on a hearing, upon the pleadings and proofs, the ground of relief can be gathered from an examination of the whole bill.

3. Also held, that a conveyance obtained by children from a father, will not be sanctioned by a court of equity, if it appear to have been caused by an abuse of confidence proposed by him in his children, who for the purpose of procu-

ring it, took advantage of his age, imbecility, and partiality for them, the conveyance being also for an inadequate cause.

4. Also held, that a conveyance by a father 74 years of age, his wife being near 70, and in delicate health, to his two sons, of real and personal estate, worth more than \$9,000, taking from his sons a bond and mortgage, to secure his and his wife's maintenance and an annuity of \$50 during their lives, was for a consideration grossly inadequate; it not appearing to be intended as an advancement.

5. If a representation be made by one to another, who is going to deal in a matter of interest, upon the faith of that representation, the latter shall make it good.

6. He who bargains, in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.

7. One falsely supposing his estate in danger, conveys it to his sons, who know that it is not in danger, but neglect to set the grantor right; this concealment is a sufficient ground for avoiding the conveyance.

8. When a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a court of equity sees that any acts or stratagems, or any undue means, or the least speck of imposition, or the least *scintilla* of fraud entered into the bargain, it will avoid the grant.

9. A deed procured by fraud or undue influence is void, and will be set aside in equity, not only as against the one who practiced the fraud, or exerted the influence, but as to third persons who have acquired interests under it, though they may be perfectly innocent, thus undoing the whole transaction.

10. Marriage is a valuable consideration; a voluntary deed ceases to be so, if a marriage be induced by its provisions; but it should appear that it was the cause of the marriage, by evidence to that effect. The mere fact that one, holding a voluntary conveyance of property, marries, will not make the conveyance good.

11. All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties to a bill in

equity, if within the jurisdiction of the court; but to a bill filed against one to set aside a deed of bargain and sale of land, absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party, for the trust not being declared by writing, is void.

12. A trust must be manifested and proved by writing, or it is void within the statute of frauds.

Decree of Chancellor dismissing bill, *reversed*.

HOPKINS v. M'LAREN, 4 Cow. 667.

Mortgage; Evidence; Payment; Practice in Equity.

APPEAL from Chancery.

Where the owner of an equity of redemption filed her bill against an assignee of the mortgagee, to have it delivered up and cancelled on the ground that it was paid, and that she had recovered against the assignee in an action of ejectment upon the issue of payment; and the assignee answered the bill, and proofs were taken, and the cause brought to a hearing; when it was discovered that the mortgagee had assigned the mortgage conditionally; and that since the bill filed, the mortgage had been redelivered to him, for a violation of the conditions of assignment, and he was thereupon brought in and made a party upon a supplemental bill; upon which he answered both the original and supplemental bill at large, denying payment of the mortgage; to which the plaintiff put in a general replication, and brought the cause to a hearing, without taking any proofs as between herself and the mortgagee.

It was held by the Court of Errors, that the facts set up by the mortgagee, must be taken on the hearing to be admitted; and that he was not affected by the proofs taken between the original parties to the suit; but should have been allowed to prove the truth of his answer; and that the recovery in ejectment against his assignee, was not conclusive against him.

Decree of Chancellor *reversed*.

CLOWES v. DICKINSON, 9 Cow. 403.

In Ch. 5 J. C. R. 235.

Judgment and Execution; Heirs; Debtor and Creditor.

THE bill in this case was filed by the plaintiff Clowes, who had purchased two lots of land of V. against whom there was an existing judgment. All the real estate of V., (the residue of which was more than sufficient to satisfy the judgment,) was sold, subject to all incumbrances, under a subsequent judgment, and execution thereupon, under which the two lots of the plaintiff were sold to the defendant D., who made improvements thereon, and sold one of the lots.

The Chancellor (Kent) held, that though the court would have interposed and prevented the sale of the plaintiff's two lots, until the judgment creditor had exhausted the estate remaining in the hands of the debtor, before selling the plaintiff's lot, if he had applied in due season for that purpose; yet, as he knew of the sale at the time, and delayed four years before he filed a bill for relief, the court would not disturb the sale, or direct a reconveyance of the lots to him; but the court decreed that the purchaser should pay the plaintiff as an equitable indemnity, under the circumstances of the case, the *sum for which the lots were sold*, with interest from the time.

The Court of Errors on appeal, *reversed* the decree of the Chancellor in form, but in effect affirmed it, except as to the rule of compensation. They held that the *judgment creditor* might have been compelled, on motion to the court in which his judgment was obtained, or on filing a bill in Chancery, by order or decree, to exhaust the estate remaining in the hands of the debtor or his heirs, before selling the part so aliened; and that if he first sell the land aliened, before resorting to the other, though no order or decree be obtained, he shall restore it to the alienee; or if sold to a *bona fide* purchaser, before bill filed, the judgment creditor who bid it in, shall account to the first alienee for the *value of the real estate aliened*, if the other assets of the vendor would have satisfied the judgment; or if they would not have satisfied it, then that the judgment creditor should account to the

alienee, the plaintiff, for the value of the premises over and above what would have satisfied the judgment, after so exhausting the judgment debtor's assets.

As to that part of the Chancellor's decree refusing to disturb the sale, the Court of Errors held that the alienee should not be allowed the land itself, having stood by and seen the sale, with improvements, before he asserted his claim. The only ground of *reversal*, therefore was, that the Court of Errors held, that the *true value of the aliened estate in the market, at the time of the sheriff's sale*, and not the price bid at sheriff's sale, and paid for it, should form the measure of the alienee's compensation.

HARRIS v. KNICKERBACKER, 5 Wend. 638.

In Ch. *K v. H.* 1 Paige, 209.

Specific Performance ; Parol Contract for Land.

THIS was a bill for specific performance.

Harris the defendant below, agreed in September 1815, to purchase of K., a lot of land supposed to contain about 100 acres. He was to pay \$21 50 for the land, the quantity to be ascertained by actual survey, and to be paid for in 7 equal annual payments. The complainant K., was to have the land surveyed, and to give a deed to the defendant on his paying \$300 or more of the purchase money, and giving a bond and mortgage for the residue. The bill alleged that the purchaser was to pay interest from the time of the purchase. The defendant answered that he had no knowledge, remembrance, or belief, that by the terms of the original bargain, any interest was to be paid. But *one* of the defendant's witnesses testified that he understood from him that he was to pay interest after the first payment became due on the 20th of December, 1815. The contract was not reduced to writing ; but the defendant went into possession of the land under the agreement, and continued so until February, 1824. On the 23d December, 1815, the defendant made a payment toward the land, and took a receipt from the plaintiff in the words following : "Received this 23d December, 1815, of

John Harris, \$333 in part payment of a piece of land, which I am to deed to him, lying, &c., which conveyance is to be made, as soon as the land can be run out. John Knickerbacker, junior." The defendant continued to make payments toward the land from time to time, until August, 1821, and took receipts therefor, of the same purport. Several surveys were attempted, but the parties could not agree as to the location and boundaries of the lot. In the fall of 1823, the complainant tendered a deed to the defendant and demanded payment or security for the balance of the purchase money. The defendant refused to accept the deed, alleging it contained too much land, and that the complainant had included too much interest in the balance claimed to be due. In January, 1824, the bill was filed to compel a specific performance, and in February thereafter, the defendant made a formal demand for a deed, but made no tender or offer to pay the balance then due. The complainant declined to give him any other deed than the one offered before; whereupon the defendant gave him a written notice that he considered the contract at an end, and demanded repayment of his money. He then commenced a suit at law for its recovery, which was stayed by an order of the Court of Chancery.

The Chancellor held, that the contract as to the purchase of the land was good, and that neither party could take advantage of its not being in writing; that the defendant's demand made after the bill filed, was a nullity, and that the contract was not thus rescinded, and that the *single* witness of the defendant, was sufficient to establish the contract as to interest, as stated in the bill, the defendant having only denied it on *knowledge and belief*, and the Chancellor decreed a specific performance accordingly.

The Court of Errors *reversed* the decision, holding that the answer sufficiently denied the agreement as to interest, and that the evidence of the one witness was not sufficient to destroy the effect of the denial in the answer.

But *leave* was given the complainant to *amend* his bill so as to make it conform to the terms of the contract, as admitted by the answer of the defendant; upon such terms as to costs in the court below, as the Chancellor should direct.

SMITH, appellant, v. ADAMS, 24 Wend. 585.

Reported 6 Paige, 435.

Jurisdiction ; Decree.

THE only part of the decree of the Chancellor which was reversed by the Court of Errors in this case, was a clause by which after dismissing the bill *for want of jurisdiction*, the complainant, although his right to sue at law was saved by the clause, was precluded "from again litigating the question whether there had been any diversion of the water which had been accustomed to flow through his aqueduct." It was to restrain this alleged diversion, that the bill was filed. The cause had been heard on pleadings and proofs.

The Court of Errors held unanimously, that part of the decree erroneous, and it was modified accordingly.

Mr. Justice Bronson, who delivered the only opinion, says: "As my opinion rests on the ground that the bill should be dismissed for want of jurisdiction, I think the decree should be so modified, as *not to prejudice* the complainant's right to sue at law for the redress of the injury of which he complains."

LIVINGSTON v. REYNOLDS, 26 Wend. 115 123.

See Chancellor's opinion, 26 Wend. 117-119.

Injunction ; Waste by Lessee.

THE bill in this case was filed against tenant to restrain him from *cutting down wood for the purpose of burning bricks*, and from digging up the soil to *make bricks*. The lease contained a covenant that the lessee would "not injure, cut down, take, destroy, or carry away, upon or from the demised farm, any more wood than should be actually *used and employed thereon* ; nor make, nor suffer to be made, any manner of waste, sale, or destruction, in the wood or timber, as aforesaid, by any ways or means whatsoever."

In May, 1838, the defendant cut about 20 cords of wood on the premises, with which in the autumn he burnt a brick

kiln, the *clay* for the brick being dug on the same lot. The bricks were burnt to be sold, and about half were sold, the rest remaining on hand. The defendant in his answer insisted that he had a right to *cut wood to burn brick*; that the wood was not needed to be left standing for any *useful purpose*; and that the land was more valuable for agricultural purposes than as wood land. And upon the answer and corroborating affidavits, he moved to dissolve the injunction.

The Chancellor dissolved the injunction, holding that the covenant in the lease above recited, did not prevent the defendant from cutting wood to burn brick *on the premises, provided it was not contrary to good husbandry*; and he adds: "It is *not alleged* in the bill, that the burning of bricks is an *unusual business in the neighborhood*, on this and other farms, or that it is contrary to good husbandry to use a portion of the wood for that purpose; or even that the burning of bricks is a *new business, which was not carried on there at the time of giving the lease*."

But the Court of Errors held, that under the covenant in the lease, the acts of the tenant were *waste*, and, without regarding the grounds of the Chancellor as to what was *not alleged* in the bill—that enough was alleged to show that the *waste* was prohibited by *law*, and not authorized by the contract of the parties. 2. That even if the actual injury was such an one as in the language of the Chancellor, might not be of sufficient importance to authorize him to interpose before the complainant had established her right at law, yet as the bill was to obtain an injunction against *future waste*, rather than an account and satisfaction of the past; and as the tenant avowed his act and intention to repeat it, insisting on his right, it was not only sufficient to *justify*, but to *require* the prompt and effective interference of equity, and the interference should have been had. An account and satisfaction of the waste already committed, should be decreed, and the injunction rendered absolute and perpetual.

The court accordingly unanimously *reversed* the decree of the Chancellor, holding also, that an appeal lay from an order to *dissolve* an injunction to this court.

✎ Why not as well object to the bill, that it *did* “*not allege*” that the ashes were *not* spread on the land, and greatly improved it? Or that it did not state the *clay* used to be of *any value*, or that *better soil* had not been substituted in its place, &c., &c.

DURANT v. THE SUPERVISORS OF ALBANY, 26 Wend.
66-109.

See Chancellor's opinion, id. p. 67.

Bill in nature of Creditor's Bill for County Taxes.

THE supervisors of Albany, after warrants for enforcing payment of county taxes had been returned *unsatisfied*, filed a bill similar to a judgment creditor's bill after return to *feri facias* of *nulla bona*. Demurrer to the bill overruled by Vice Chancellor. On appeal from his decree,

The Chancellor sustained the bill also, holding it to be analogous to a creditor's bill upon return of execution at law, unsatisfied, and that the complainants had exhausted the remedy which the statute gives them against the property of the defendant, and that the suit was properly instituted in the name of the supervisors instead of the county treasurer. But

The Court of Errors, after full and elaborate argument by counsel held, that *such a bill* does not lie at the suit of a county to enforce the payment of county taxes, and that if the law was defective in this particular, it was the duty of the legislature to provide the remedy; and that it did not belong to the Court of Chancery, to amplify its jurisdiction to that end.

✎ See the opinion of the President of the Senate (Bradish) in this case, reviewing the history of *creditor's bills* in England and this country.

TRIPP v. COOK, 26 Wend. 143.

Practice ; Opening Bids for Mortgaged Premises.

THIS was an application to open a sale of mortgaged premises, and for a resale, which the Chancellor refused. The questions presented were chiefly of fact ; viz., whether the mortgagor had been misled by the mortgagee, in reference to the foreclosure of the mortgage, and in consequence did not attend the sale.

The Chancellor having *denied* the application, the defendant appealed, and one question made was whether as he had allowed the bill to be taken *pro confesso*, he had the right to appeal from this order ; and the Court of Errors held, that an appeal lay. It also held, that although the mortgagee complained also of having been misled by the mortgagor, who had represented to him that some land at Geneva, which he had taken on account, was worth \$1,000, whereas it was not worth more than \$400, yet that a court of equity would not, in settling the rights of parties, look beyond the transaction in regard to which relief is asked by one party, and take into consideration other and different transactions set up by the other party as presenting equities on his side, and it was held, that the case of *M^r Donald v. Neilson*, 2 Cow. 139, cited and relied on by the Chancellor as an authority for his decision, did not sustain or sanction it.

The Chancellor's decree was accordingly *reversed* by 11 to 6 ; and a *new decree* made by this court, giving the appellant the benefit of the sale of the property made by the respondent since the master's sale to the amount of the excess of the value, \$1,000.

LE GUEN v. GOUVERNEUR v. KEMBLE, 1 J. C. 436-524.

Relief in Chancery after Trial and Judgment at Law ; Judgment or Decree as to what is Binding between the Parties ; Appeal from Order granting Feigned Issue ; Costs on Appeal on Reversal of Decree.

THE respondents, Gouverneur and Kemble, as factors of the appellant, Le Guen, on the 13th of April, 1795, at New York, sold to Lopez and Rivera, about 600 bales of cotton, and 12,000 pounds of indigo of the isle of France, amounting to \$122,415 in the whole ; for which the purchasers gave their promissory notes, payable in one year, with interest after 60 days. A written contract by direction of the appellant, was entered into between the respondents and the purchasers ; and among other conditions of the contract, it was stipulated that the proceeds of the articles in France, or elsewhere, should be first applied to the payment of the purchase money ; and further that the respondents " might have it in their option to receive the whole or a part of the amount of the said notes, at Havre de Grace, or at any other port, the ship carrying the property for the purchasers, might discharge at in Europe."

A few days after, the goods were shipped on board and the vessel sailed for Havre de Grace, in France, where she arrived about the first of July, 1795 ; from thence, by direction of Gomez, who was on board, she sailed to Hamburgh, and there landed the goods, which were afterward reshipped to London and there sold.

The appellant made repeated applications to the respondents or their agents, to make election to receive the purchase money out of the proceeds of the articles in Europe, to give an authority by which the appellant might receive the surplus thereof, after the respondents had retained a sufficient sum to indemnify them for all their advances and responsibilities on account of the appellant. The respondents, declining to follow this direction, and to make the election, the appellant considered them as having thereby substituted themselves in the place of the purchasers, and become liable for the purchase money, and thereupon brought an action at

law in the Supreme Court of this state, and obtained a final judgment against the respondents for the amount, and the judgment was affirmed in the Court of Errors.*

Before the trial at law, two of the purchasers, (the other refusing to join,) on the 11th of October, 1796, filed a bill in Chancery against the appellant, the respondents, and Lopez the other purchaser, praying relief on the ground of fraud in the sale; alleging that the appellant had represented the cotton as of the growth of the Isle of France, whereas it was in truth of the growth of Surat, and the indigo, as of two descriptions, florary and violet copper, when a small part only was of one of those descriptions, and the remainder of different kinds, and that the appellant had produced samples agreeing with his representation; that the articles proved to be of inferior quality to those for which they were sold, and brought in London \$20,000 less than they would have done had they been of the description and quality represented.

The appellant in his answer, denied fully and positively all the allegations of the complainants, on which the charge of fraud was founded. On the 9th of May following, the respondents put in their answer to the bill, declaring that they did not know that the appellant had practised any fraud or misrepresentation in the sale, and on the 20th of June following, Lopez, the other purchaser, put in his answer, which agreed in substance with that of the appellant, and exculpated him from all the allegations of fraud or misrepresentation.

A few days after the affirmance of the judgment in the

* There does not appear to be anything essential to the right understanding of this case, as presented to the court on appeal from the Chancellor, contained in the report of the case, in the Supreme Court or the Court of Errors, which is given in a note to this case; 1 J. C. 437-491. Both courts held that "the election reserved to G. and K., by the contract with Lopez and Rivera, must be considered for the benefit of Le Guen, the respondents having been made factors for the benefit of the appellant, and this stipulation being incident to the trust confided to them; G. and K., could not avoid a compliance with the instruction of Le Guen, as to the exercise of the right of election, without violating their duty."

"That the proper rule of damages in such a case, is the amount of the sales to Lopez and Rivera, deducting the amount of the demand due to G. and K. from Le Guen."

Supreme Court, to wit, on the 20th of March, 1798, the respondents filed a bill, also, in the Court of Chancery, against the appellant, stating the sale of the cotton and indigo, the suit brought by Gomez and Rivera in Chancery, and that they had obtained an injunction on the ground of fraud, on the part of the appellant, and that the suit remained undetermined; and praying that the appellant might be enjoined, from suing out execution on the judgment against them, in the Supreme Court, as it would be unjust to permit him to receive money, until it was ascertained whether he had been guilty of the fraud alleged by the purchasers. The bill concluded with praying an injunction and relief, and an injunction issued accordingly. On the 7th of June, 1798, the appellant put in his answer to the bill of the respondents, in which he set forth the bill filed by Gomez and Rivera, and his answer to that bill, in which he explicitly denied every allegation of fraud.

To prevent any risk or inconvenience to the appellant, the Chancellor ordered the respondents to pay the amount of the judgment into the Bank of New York; and the plaintiff was permitted to draw out, unconditionally, about \$53,000; the residue was received by him on giving security to refund, in case it should become necessary by the decree of the court.

After publication had passed, the Chancellor on the 1st of March, 1799, directed an issue to be tried in the Supreme Court. The question was reserved "whether the respondents were precluded by the antecedent circumstances, from insisting on the alleged fraud as a ground of relief?" The Chancellor held that they were not precluded, and confirmed the order for the trial of the issue. From this order the present appeal was brought to the Court of Errors.

Three questions were raised. 1. Whether inasmuch as, *previous to the trial at law* between the appellant and respondents, they had full notice of the pretended fraud, by the bill exhibited by Gomez and Rivera, they were not bound if they meant to avail themselves of that defence, to avail themselves of it at that trial, and consequently, whether they were not precluded from urging it to impeach the judgment against them?

2. If not precluded, whether from the nature of the testi-

mony in the cause, it was proper that there should be an issue to be tried by the jury?

3. Whether this court, being regularly in possession of the cause, with all the evidence, will not decide the whole controversy between the parties?

Radcliff, J., delivered an opinion on the first point, maintaining that the judgment of the appellant in the Supreme Court against the respondents, did preclude the latter from maintaining this suit, and that the court ought to make a final decree, and that the bill ought to be dismissed. With this opinion Kent, J., Benson, J. and Lansing, Ch. J., concurred. Kent, J., delivered an opinion, in which as to the first point, he says:—

“The suit at law of the appellant against the respondents was a special action on the case, for a breach of their duty as factors in refusing to elect to receive the amount of the notes in Europe, and to give the appellant the requisite authority for that purpose. In consequence of this default, the respondents became, in respect to the extent of the remedy, substituted in the place of Gomez and Co., and responsible (to the appellant) for the amount of the property. The breach of duty reached to the whole property, and the principal had a right to abandon it to them, and to regard them as appropriating the whole to their own use. This was the amount of the decision in the suit at law.

“Placed in the situation of Gomez, Lopez, and Rivera, and subject to their burthens, the respondents took, of course, their advantages, and succeeded to the same means of defence. This is an universal principle of law and justice.

“The respondents were, accordingly, competent to set up as a defence in the suit at law, the fraud alleged in the present action, and there was nothing in the form of the action which precluded them from doing it. The respondents were sufficiently apprised of the allegation of fraud, and that it was contemplated by Gomez and Rivera, as a defence against the notes. They were informed of this by the bill previously exhibited by Gomez and Rivera, in the court below. All the testimony now produced, was, for anything that appears to the contrary, equally within their power then as now, and yet no effort was made to produce it. They have chosen to

abide by one species of defence and to waive another, and like other litigants in similar cases, they must be concluded by their election."

He considers the other two questions; but as the second point is chiefly a review of the evidence in the cause, it is sufficient to state that he agreed that the "cause ought to have been decided in the court below, without the useless delay and expense of a trial at law."

Thirdly, he considers the question, "Having the merits before us, shall we not decide finally between the parties?"

"I can not bring my mind to doubt the authority of this court." He cites a number of authorities from P. Wms. and Bro. P. C., to prove that this is the "established rule of the House of Lords, in England, upon appeal"—"to give such a decree as the court below ought to have given."

Lewis, J., dissented.

The decree was accordingly, that the order of the Chancellor appealed from should be *reversed*, and the bill of the complainants dismissed.

Costs and damages to be assessed against the respondents, having been moved for on the part of the appellant, the court took time to consider, and after argument and advisement, decided :

1. That if judgment be given in the court below against the plaintiff, and he bring error, and the judgment of the court below be *reversed*, he recovers only the costs of the suit below; because the court of review gives such judgment as the court below ought to have given, and no other, and it would be unreasonable to compel a party in case of reversal to pay costs for the error of the court below.

2. If the plaintiff below recover, and the defendant below bring error and *reverse* the judgment, he obtains no costs, unless it be the costs of the court below, up to the judgment.

The decree as to costs, therefore, was that "the respondents should pay to the appellant the costs only of the proceedings in the court below, up to the time that the order for an issue was made absolute, and that each party pay his own costs on the appeal."

McVICKAR, PHILIPS, and STEWART, appellants, v. WOLCOTT, GRACIE, and others, respondents; 4 J. R. 510.

Not reported in Ch., but opinion of Lansing, Chancellor, given 4 id. 515.

Relief in Court of Equity after Trial and Judgment at Law.

A SUIT was pending in the Supreme Court by the appellants to recover the amount of certain advances made by them, under an agreement, to a third party. By consent of parties, the cause was referred to three referees, and the usual rule entered for that purpose. The cause was fully heard before them, two of whom in January, 1807, made a report in favor of the appellants, for \$3,740. The other referee did not concur. Soon after, and before any judgment could be obtained on the report, the respondents filed their bill in Chancery against the appellants, and an injunction was awarded to restrain the appellants from prosecuting their suit at law, until the further order of the Court of Chancery.

The bill charged among other things, that the appellants had been reimbursed for their advances by Cruden, who was a party to the agreement alluded to above; that the suit at law was prosecuted by them for Cruden's benefit, who was also with the other parties to the agreement, made a defendant in the bill.

On the filing of the appellants' answer, denying the facts charged in the bill, they moved to dissolve the injunction, which motion, Lansing, Chancellor, denied with the costs of resisting it. The Chancellor says: "The defendants at law, I rather thought, could not there have availed themselves of the defence they set up before me; and so thinking, I decided the point according to my impression at the time, leaving it open for a further discussion at the hearing. The complainants alleged in their bill, that they were unable for want of sufficient proofs, or any confession, or discovery, to show several facts material to their defence, and which they particularized, *without a discovery*, by the defendant, (in this suit,) which has always been deemed a good reason for resorting to Chancery."

The Court of Errors *reversed* the order. Van Ness and

Spencer, Js., delivering opinions in favor of reversal, and Kent, Ch., declaring himself of the same opinion. The court first decided a preliminary question, as to the right to appeal from such an order, holding it to be within their jurisdiction by the statute regulating the proceedings of the Court of Errors.

The court also held, that a Court of Chancery will aid a defendant in obtaining a discovery before a trial at law, and not after. Van Ness, J., says: "Granting for a moment that such answer would have furnished the respondents with a complete defence, still as they omitted to take the necessary steps to possess themselves of that answer, before the trial at law, which they might, and if they deemed it important, ought to have pursued, they are now too late. I am satisfied that the appellants, notwithstanding they have answered the bill, are at full liberty to avail themselves of this objection."

Spencer, J., held the same doctrine, and the order was accordingly reversed.

KING v. BALDWIN, 17 J. R. 384.

In Ch. 2 S. C. R. 554.

*Relief in Chancery after Trial and Judgment at Law ;
Laches of Holder of Note, &c.*

THE appellant, King, filed his bill before the Chancellor, to be relieved against a judgment obtained against him as a surety for the payment of a promissory note, which Baldwin held against one Fowler. King had defended the suit on the note, on the ground that he had been discharged by the *laches* of the holder; that he had informed Baldwin of the failing circumstances of F., the maker, who afterward failed, and took the benefit of the insolvent act; and it was proved in the present case, that K., had frequently urged B. to sue F.; but that B. said he believed F. to be an honest man, and he would not trouble him; that he would as soon lose his debt as prosecute him for it.

The judge at the circuit, held the evidence not a good defence.

The Chancellor, Kent, dismissed the bill with costs; because the question had been already tried at law, where the defence was as good as in equity, if a valid one; that having made the defence, and it having been overruled at law, he can not afterwards on the same facts obtain relief against the judgment thus obtained, but should have excepted and prosecuted his writ of error; or on the refusal of the holder to sue F., should have filed his bill to compel him to go on. On appeal from this decree,

The Court of Errors reversed it, for which the reasons were assigned by Mr. Justice Spencer, who was in favor of reversal. He held that the plaintiff having offered on the trial at law, to prove the facts which he relies on in his bill, and the evidence being rejected by the judge, he may have relief in equity, as the question of the defence being a good one at law, was doubtful; and as the facts proved discharged the surety.

On the question of *reversal*, the court stood 13 to 13, when the President of the Senate, (Lt. Gov. Taylor,) gave his casting vote for reversing the Chancellor's decree.

✂ Mr. Greenleaf has put this case among his "*overruled, denied, and doubted cases*," with this note. "Denied in *Warner v. Beardsley*, 8 Wend. 198, by the Chancellor, who says: 'it also stands in opposition to the decisions of most, if not all, of the states in the Union where the question has arisen.'"

We apprehend that Mr. Greenleaf has rather hastily placed this case among cases overruled, or denied, for in the same case, (*Warner v. Beardsley*), a little further on, the Chancellor says: "as that case, (*King v. Baldwin*), was decided by the court of dernier resort, it must probably be considered as binding authority in all cases coming directly *within that decision*." It is true that he had already said that "*Paine v. Packard*, was overruled by the Chancellor in *King v. Baldwin*. But how the Chancellor can be properly said to have *overruled* a case then just decided by the Supreme Court, the relative jurisdiction of the two tribunals makes it difficult to understand. Nor is it easy to discover on what special ground the Chancellor, in the case of *King v. Bald*

win, dissents from the doctrine of the Supreme Court in *Paine v. Packard*, while he cites, without doubting its authority or correctness, the case of *The People v. Jansen*, 7 J. R. 332. See also *People v. Berner*, 13 J. R. 383; *Powell v. Wat rs*, 17 J. R. 175.

As to the *other point* decided by the Court of Errors, in *King v. Baldwin*, viz., that a court of equity may entertain a bill to relieve a party who has made an unsuccessful attempt to offer such a defence in evidence in a *court of law*, it is of worse than doubtful authority. It is a strange and anomalous decision. If carried into practical operation, it would make the Court of Chancery a court of revision in every case where a *doubtful* defence of every species had been overruled in a court of law.

And in the case of *Berry v. Thompson*, 17 Johnson's Rep. 436, in Court of Errors; in Chancery, 3 J. C. R. 395, this precedent seems repudiated by the Court of Errors. It was there held that where a party is sued at law, on notes alleged by him to be usurious, and he suffers a verdict and judgment to be taken against him, without making any defence, or applying to the Court of Chancery, in due season, he is concluded, and is not entitled to relief in equity, and the Chancellor's decree dismissing the bill, was affirmed with costs.

MARSHALL and W. JENKINS *v.* DEGROOT, administratrix, &c., 1 C. C. E. 121-123.

Joint Debt ; Judgment Creditor's Bill against Administratrix of One.

APPEAL from Chancery. J. G. and J. G., junior, and Degroot, the defendant's intestate, made their joint promissory note for £133, payable to the appellants. Degroot died intestate. The appellants prosecuted the surviving makers of the note to judgment, issued a *feri facias* into the county where they resided, which was returned *nulla bona*, and they have since become insolvent, but the administratrix has sufficient assets from the intestate to satisfy the debt. The bill

praying that the appellant's judgment might be satisfied out of these assets, was on a general demurrer dismissed by the Chancellor with costs.

The Chancellor (Lansing) says: "This case presents the naked facts of a *joint debt* and survivorship, and I think must be determined on the rule which obtains at law, and if so, the bill can not be sustained. In giving this opinion, I regret that the rule is so well established as to oblige me to conform to it. The inclination of my mind was to afford relief, if I could discover any principles which would bear me out in it; but thinking as I do, respecting the legal principles governing this case, I dismissed the bill with costs."

The respondents not appearing to argue the case, it was heard *ex parte*.

The Court of Errors *reversed* the decree, Thompson, J., delivering the opinion of the court. He said: "The only question is, whether where three persons make a promissory note, one dies intestate but solvent, and the two survivors become insolvent, the estate of the deceased can in equity be charged with the payment of the note? I have not been able to discover any principles of justice, on which it can be exonerated. It is a rule applicable to proceedings in courts of law, that where two are jointly bound and one dies, the survivor must be prosecuted, and an action can not be maintained against the representatives of the deceased. This is, however, a rule controlling the *remedy*, and not determining the *right*. Courts of equity daily give relief where the remedy at law is extinguished."—"I have looked very fully into the cases referred to by the appellant's counsel, which I think fully establish both the right and the practice of courts of equity in giving relief in cases of this description."

Decree of the Chancellor *reversed*.

☞ The other two defendants do not appear to have been joined in this suit against the administratrix, by the report of this case, as given in Caines. That such a bill would now be held bad on a *demurrer for want of proper parties*, there can not be a doubt.

J. JACKSON and others, appellants, v. W. B. HART, respondent, 11 Wend. 343-361.

Not reported in Ch., but Chancellor's opinion given, 11 Wend. 346-348.

Effect of Denial of Equity of Bill, by Oath of Defendant to New Matter in Avoidance.

APPEAL from Chancery. W. B. Hart, the respondent, filed his bill to be relieved from the payment of a \$5,000 note, which he alleged to have been given in *renewal of a loan* previously made to him by J. Jackson, on the 30th of May, 1826, for \$5,000 at 30 days, and for which he gave him a note for \$5,000 dollars, and hypothecated to J. 130 shares of the Jefferson Ins. Co., which he alleged to be worth \$47 per share; that on the 14th of June, he borrowed a further sum of \$4,000 from J., for which he also gave him a note at 60 days, and hypothecated 103 other shares of the same stock, and that Jackson retained \$200 as interest; that when the first note became due, on the 28th of June, he applied for a renewal, and gave a new note for the \$5,000 first lent, and paid him \$225 *as interest*, that being demanded by Jackson, as a condition for renewing the loan. These two he stated were the only loans ever made to him by J., and the bill required J. to answer whether he ever made any other. The bill stated that Jackson had transferred the stocks to D. Jackson, the other defendant, and the note of the 28th of June, to one B. Hart, who was also a party to the bill, and who had commenced a suit against him upon it; also that J. Jackson, had sued him on the note of the 14th of June. The bill prayed an *injunction* staying the suits, and prohibiting a transfer of the stocks, and asked an account, and that the notes might be cancelled.

The defendant, J. Jackson, in his answer, admitted the two loans, and the hypothecation of the stocks; but as to the note of the 28th of June, he answered that *that note was not in renewal of the note of the 30th of May, 1826*, there never having been any such note, nor for the renewal of the other note, but for a *further loan of \$5,000*, and that he lent the same to Hart, upon his representation that he was a man

of large real and personal estate, &c., and *without taking any security therefor*.

The cause was heard on the pleadings and proofs before the Vice Chancellor of the first circuit, in January, 1830, who decreed upon the evidence in the case, and the allegations of the parties in the bill and answer, that the note of the 28th of June, was given as and for a *renewal* of the loan of 30th of May, and not for an original or further loan of money; that the note of 28th of June, was transferred to the defendant, B. Hart, in the ordinary course of business, and he was entitled to claim payment thereof, and that the transfer of stocks to D. Jackson, the other defendant, being to secure a *precedent debt*, D. Jackson was not entitled to retain the same, and accordingly directed the stocks to be sold, and the proceeds to be applied first to the payment of the note of the 28th of June, and the residue to the note of the 14th of June. Execution to issue for balance, and J. Jackson to pay the complainant's costs. J. and D. Jackson appealed to the Chancellor from this decree, who in October, 1832, affirmed it with costs. Upon appeal from the Chancellor's decree of affirmance,

The Court of Errors *reversed* the decision of the Vice Chancellor and Chancellor. Senator Tracy, who delivered an opinion in favor of *reversal*, in regard to the part of the answer of J. Jackson, alleging that the note of the 28th of June, was for a *new loan*, and not a *renewal* of the first loan, says: "To overcome this direct and unequivocal denial and assertion of the defendant, the complainant has produced no testimony that, on any safe principle of evidence, can be deemed sufficient. The improbability that the defendant should loan so large a sum as \$5,000 for 45 days, without security and without interest, to a person almost a stranger, of whom he knew nothing, except that he was in pressing want of money, would certainly go far, if the testimony was otherwise nearly balanced to convince every one of the falsity of the defendant's statement. But it is not a question of balanced testimony; it is all, as far as the proof of witnesses is concerned, in one scale. The complainant has voluntarily appealed for the evidence of the fact, to the defendant's oath; and having done so, the evidence thus elici-

ted, must be taken for true, unless disproved. The answer as to this fact, is directly responsive to the complainant's bill and in a matter necessary to the complainant's equity; and where this is the case, as much again evidence is required to establish his allegation, as if he had not made a witness of the defendant. If the defendant's testimony on this point be entirely discredited, it will only leave the complainant without proof in any way in regard to his allegation. He discredits his own witness, by way of impeaching his veracity without otherwise supplying the evidence which he has vainly sought from him, and which evidence he must have from some quarter, in order to support his complaint.

"I feel constrained therefore by a necessary and well established principle of law to dissent from the decree of the Vice Chancellor, and to vote for reversing the Chancellor's decision affirming that decree."

From this decision Savage, Ch. J., dissented, holding that *upon the evidence*, the pretence of J. Jackson, of a new loan of \$5,000, without security and without interest, was so completely discredited, that under the account given of the transaction by the defendant, and the absence of proof to support it, the complainant was entitled to relief, and that the decree of the Chancellor should be *affirmed*.

The court however *reversed* the decree, 13 senators voting for *reversal*, and the Ch. J. and 5 senators for *affirmance*.

☞ See *Hart v. Ten Eyck*, 2 J. C. R. 62, where Chancellor Kent held that where an answer is put in issue by filing a replication, what is confessed and admitted need not be proved; but where a *distinct fact* by way of *avoidance*, is insisted on by the answer, he must prove the fact so insisted on in defence.

An appeal, however, was taken in the cause, and Mr. Johnson, the reporter, in a note to the case in his digest, says "Spencer, Ch. J., gave a different opinion as to the latter position, in which a majority of the Court of Errors concurred, but as the case was expected to come up again, and the reporter not possessing the reasons of the court, the case was not reported."

1 Johns. Dig. 225, § 514.

JENKINS and others v. WILD and JENKINS, 14 Wend. 539.

Decree ; Final or Interlocutory ?

THIS was an appeal from an order or decree of the Chancellor, settling the *principles of the decree*, but ordering a reference to a master to *restate* the accounts, &c., upon the coming in of whose report, a subsequent final order or decree was to be made, and the question arose, on a motion to quash the appeal, for having been brought after 15 days, whether this *decretal order* was to be considered as a *final* decree within the statute, or an interlocutory order or decree from which an appeal must be brought within 15 days?

The Court of Errors held, that this decretal order, though it disposed of the main questions in the cause, and settled the principles of the final decree, was not, however, a *final* decree of itself, and that it was also well settled, that the 15 days were to run from the *notice* of the decree by the party entering the order, to the party appealing, unless the party appealing had entered the order appealed from. The cases of *Kane v. Whittick*, 8 Wend. 219 ; *Travis v. Waters*, 12 J. R. 500 ; and *Jaques v. The Methodist Episcopal Church*, 17 J. R. 558, are referred to, as to what are interlocutory or final decrees. But as no *notice* of the entry of the order appealed from had been given to the appellant's solicitor, the court held that the appeal was well brought, although the appellant's solicitor, had *actual knowledge* of the entry of the order, no *formal notice in writing* having been served upon him by the opposite party to limit the time of appeal.

Motion to quash appeal, *denied*.

CONSTITUTIONAL LAW—INSOLVENT LAW.

PENNIMAN *v.* MEIGS, 9 J. R. 325; overruled by case of CROWNINSHIELD *v.* STURGES, 4 Wheat. 122, &c.; OGDEN *v.* SAUNDERS, &c., *id.* MATHER *v.* BUSH, 16 J. R. 233; ROOSEVELT *v.* CEBRA, 17 J. R. 108; overruled as *ante.*, NEW LOAN OFFICERS OF ALBANY *v.* CAPRON, 17 J. R. 44; ROOSEVELT *v.* KELLOGG, 20 J. R. 208.

Effect of Discharge of Debtor from his Debts, under State Insolvent Laws on Contract.

IN the case of *Penniman v. Meigs*, an action of assumpsit, was brought upon a promissory note given in Connecticut, after which the defendant removed to Albany, and thence a short time before the note was given, to the state of Rhode Island. After the giving of the note, the defendant obtained his discharge under the insolvent act of this state, discharging his person and future acquisitions from the debt. A verdict having been found for the plaintiff, subject to the opinion of the court, a new trial was granted.

Per Curiam. There can be no doubt but that we are bound to consider a discharge under the insolvent act of *this state* as a bar to all suits brought *here* upon antecedent contracts, wherever made. The statute is peremptory, and binding on our courts. It was for the wisdom of the legislature to say whether foreign contracts should be exempted from the operation of our insolvent acts, but they have not made any such exception. New trial granted.

✎ This decision seems to have been acquiesced in by the profession in this state, until the decision of the Supreme Court of the United States, in the case of *Sturges v. Crowninshield*, 4 Wheat. 122. That was an action of assumpsit brought in the Circuit Court of Mass., and the defendant pleaded his discharge, obtained in 1812, under the insolvent act of the state of New York, of 3d April, 1811. The two notes on which the suit was brought were dated at New

York, on the 22d of March, 1811, *before* the insolvent act was passed. To the plea of discharge, there was a general demurrer and joinder.

After elaborate argument of the question of the constitutionality of the act: 1. As to the right of a state to pass *any* bankrupt law, and whether the power was not *exclusively* vested in Congress by the constitution; and 2. Whether the insolvent act of New York, was not "a law impairing the obligation of contracts," like that in question in the case,

The Supreme Court of the United States decided: 1. That since the adoption of the constitution of the United States, a state has authority to pass a *bankrupt law*, provided it does not impair the obligation of contracts, within the meaning of the constitution, Art. 1, S. 10; and *provided* there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.

2. That the act of New York, of April 3d, 1811, which not only liberates the person of the debtor but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes, so far as it attempts to *discharge the contract*, is a law impairing the obligation of contracts, within the meaning of the constitution, and was not a good plea to discharge the defendant from the debt in the case before the court, and to that effect was the certificate to the Circuit Court.

At the same time the case of *McMillan v. McNeill*, 4 Wheat. 209, came before the court. McMillan owed McNeill \$700, paid for him as his surety, in 1813, at Charleston, S. C. after which McMillan removed to Louisiana, and in 1815 was discharged under a law of 1808, of that state, as well in his person as his future property, from all his debts. Previous to this, he had obtained a discharge along with his foreign partners, under the bankrupt law of Great Britain, which was also pleaded.

The Supreme Court of the United States held, that the discharge under the act of Louisiana, was no bar, although it was passed *before* the debt in question was contracted; that it made no difference in the application of the principle in this case, McNeill the plaintiff being a resident of another state, and the same judgment was given. See also *Dart-*

mouth College v. Woodward, 4 Wheat. 518, as to state laws impairing the obligation of contracts; also, case of *Owings v. Speed*, 5 Wheat. 420-421; *Green v. Biddle*, 8 Wheat. 1, 108.

After the foregoing decision of the Supreme Court of the United States, the first question that seems to have been presented to the Supreme Court of this state, upon the effect of a discharge under the insolvent act of the state was made in the case of *Mather v. Bush*, 16 J. R. 233, May, 1819. That was a motion to set aside a *fi ri facias*, on the ground that the defendant was duly discharged from all his debts under the act of April 12, 1813. The judgment was entered up in May, 1817, on a contract made in 1816, and both parties were at the time of passing the act, and ever since, had been citizens of this state. Several similar applications having been made in other causes, counsel were heard for the different parties. The opinion of the court, however, embraces only the motion to set aside the *feri facias* in this case.

Spencer, Ch. J., delivered the opinion of the Court. He says: "Were it not for the decision pronounced in the Supreme Court of the United States, at the last term, we should not hesitate for a moment in ordering the execution in this cause to be set aside, as irregularly and illegally issued; and nothing but the consideration that that court has a paramount and controlling jurisdiction in cases involving a construction of the constitution of the United States, has induced this court to permit the question as to the constitutionality of the insolvent law, to be argued. The respect which we feel and owe to the court of the *last resort*, must induce us, whatever may be our individual opinions, to surrender them up and yield that obedience which the constitution and laws of the United States exact of us.

"We are decidedly of opinion that neither of these cases (*Sturges v. Crowninshield*, and *McMillan v. McNeill*,) decide the question presented in this case, and that there is a material and manifest distinction between them. In the leading case, the court cautiously declare 'that their opinion is confined to the case actually under consideration.' An insolvent or bankrupt law in force, when the contract was made, does not, in the sense or meaning of the constitutional provision,

impair the obligation of such contract. On this point the Supreme Judicial Court of Mass., have unanimously expressed an opinion which commands our full assent. In the case of *Blanchard v. Russell*, (13 Mass. R. 16,) they say: 'a law which is in force when a contract is made, can not be said to have that effect; for the contract being made under the law, is presumed to be made with reference to it, and the parties are legally conusant of it at the time. The contract in such case is not impaired by the law, for the law is a part of the contract.'

"On the whole, after our laws of insolvency have been continued with very little variation except as to the act of 1811, from the period of the formation of the constitution of the United States; after we have repeatedly pronounced regular and fair discharges under them to be valid and effectual for such a series of years; and when the cases decided by the Supreme Court of the United States, are so perfectly distinguishable from the case now presented, it is too much to ask this court to take a step in advance of the Supreme Court of the United States, and to anticipate their decision, on a question certainly not decided. We are therefore unanimously of opinion that the execution in this case be set aside with costs. We reserve our opinions until next term, upon the motions to set aside the executions issued on judgment, from which the defendants were discharged under the act of April, 1811, and also on the motions for leave to issue writs of *scire facias*; those cases require more consideration than the limited time of this term will enable us to bestow.

At the next August term, the case of *The New Loan Officers of The County of Albany v. Capron*, (17 J. R. 44,) occurred, in which the court held that a discharge under the act of April 12th, 1813, was a good bar to an action of covenant on a covenant in a mortgage, to pay the deficiency on sale of the premises.

The Supreme Court at the same term decided the case of *Roosevelt v. Cebra*, 17 J. R. 108, where they held that a discharge under the insolvent act of 1811, did not discharge a debt created *prior* to the passing of that act, and that the act was, as impairing the obligation of prior contracts, unconstitutional and void.

Per. Spencer, Ch. J. "As the contract on which the judgment was founded was made prior to the passing of the insolvent act of the 3d of April, 1811, we can not distinguish it from the case of *Sturges v. Crowninshield*. The motion to set aside the execution, must therefore be denied. Without entering into a further discussion of the question, we shall content ourselves with referring to the opinion of this court, in the case of *Mather v. Bush*, at the last term, and with expressing our regret at the injurious consequences, which must result from a decision which we have been compelled to pronounce, in obedience to the constitution of the United States, and what is now the law of the land."

At the August term, in 1822, the case of

ROOSEVELT v. KELLOGG, 20 J. R. 208,

was decided. That was the case of a plea of discharge under the act of April, 1813, and the only point which touches the question of impairing the obligation of contracts, decided by the court was, that the certificate was valid, as against a citizen of New York, although it did not except the foreign creditors. The discharge was held to be valid, the contract having been made subsequent to the act of April, 1813, between citizens of the same state.

At length, at the January term, in 1827, of the Supreme Court of the United States, the question as to the constitutionality of a state insolvent law, operating only *prospectively, upon contracts between citizens of the same state, at the time of making the contract and up to the time of discharge*, was brought before that court in the case of

OGDEN v. SAUNDERS, 12 Wheat. 213,

in which and other cases argued with it, all the questions were fully argued. They were discussed afterwards by a divided court at great length and with eminent ability.

The case of *Ogden v. Saunders* was an action of assumpsit brought in the District Court of Louisiana by Saunders, the defendant in error, a citizen of Kentucky, against Ogden the plaintiff in error, a citizen of Louisiana. The action was

upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington in the state of Kentucky, upon the defendant below, Ogden, in the city of New York, (he then being a resident and citizen of the state of New York,) and accepted by him at the city of New York, and protested for non-payment.

Ogden, the defendant below, pleaded several pleas, among which was a plea of discharge under the act of the legislature of the state of New York of April, 1801, for the relief of insolvent debtors, commonly called the *three fourth act*.

The jury found the facts in the shape of a special verdict on which the court below rendered a judgment for the plaintiff, and the cause was brought by writ of error to this court. The question which arose under this plea, as to the validity of the law of New York, was argued at February term, 1824, by Mr. Clay, Mr. D. B. Ogden, and Mr. Haines, for the plaintiff in error, and by Mr. Webster and Mr. Wheaton, for the defendant in error, and the cause continued for advisement until the present term. It was again argued at the present term *in connexion with several other causes, involving the general question of the validity of the state bankrupt or insolvent laws*, by Mr. Webster and Mr. Wheaton against the validity, and by the Attorney General, Mr. F. Livingston, Mr. D. B. Ogden, Mr. Jones, and Mr. Sampson, for the validity; 12 Wheat. 213-214.

The argument of Mr. Webster, p. 242, in discussing the position taken by the Supreme Judicial Court of Mass., and adopted by the Supreme Court of New York, in *Mather v. Bush*, "that the state law *existing at the time, is to be considered a part of the contract*," treats this great question with a force of logic that makes us regret we can not transfer it entire to our pages. We will only extract a single paragraph from his argument as reported, p. 243. He says:

"This contract," in the language of one of the authorities relied on, "is to be construed as if the law were specially recited in it."—"Let it be so for the sake of argument. But it is also to be construed as if the prohibitory clause of the constitution of the United States, were recited in it, and this brings us back to the precise point from which we departed.

"The constitution always accompanies the law, and the latter can have no force which the former does not allow to it. If the reasoning were thrown into the form of special pleading, it would stand thus: the plaintiff declares on his debt; the defendant pleads his discharge under the law; the plaintiff replies the law is unconstitutional, but the defendant says, 'You knew of its existence;' to which the answer is obvious and irresistible. 'I knew its existence on the statute book of New York, but I knew at the same time it was null and void under the constitution of the United States.'"

The judges who were for reversing the decision and upholding the state laws between citizens of the same state, delivered opinions *seriatim*. Mr. Justice Washington, in an opinion of great ability, and characterized by the caution and modesty so conspicuous in his character, private and judicial, arrives at the result that the state law granting the discharge was valid in this case, as having been in force at the time the contract of acceptance was made. Mr. Justice Johnson, Mr. Justice Thompson, and Mr. Justice Trimble, delivered opinions to nearly the same effect in favor of *reversal*. The majority of the court was thus in favor of the validity of the law set up in the defendant's plea of discharge, p. 254-332.

The opinion of the *minority* of the court, Ch. J. Marshall, Mr. Justice Story, and Justice Duvall, was delivered by the Chief Justice, 12 Wheat. 332-357.

Of the great principles there discussed, the obligation of the states to furnish remedies for the enforcement of all legal contracts, the effect of a law discharging *prospective* contracts, and the high political considerations involved in the recognition of this power in each state, to shape the remedies at pleasure on contracts that might be made *after* the passage of such a law, we shall not undertake to give what would be only a faint epitome.

✎ The judgment in this case was rather in favor of the validity of a discharge under the state laws, in *those cases argued in connexion with this case*, where the contract was made between citizens of the state under whose law the discharge was obtained, and in whose courts the certificate was pleaded. This case being that of a contract made between

citizens of different states, though the insolvent law under which the defendant was discharged was in existence at the time, a *re-argument* was had on that point in this case of *Ogden v. Saunders*, and the judgment of the District Court of Louisiana was *affirmed*; thus rejecting the state law in this particular case, on the ground that Saunders, a citizen of another state, was not bound by it. Johnson, J., delivered the opinion of the court, and in conclusion says: "And the purport of this adjudication, as I understand it is, that as between citizens of the same state, a discharge of a bankrupt by the laws of that state, is valid, as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid *as to all contracts*." Mr. Chief Justice Marshall, Mr. Justice Duvall, and Mr. Justice Story, assented to the judgment of affirmance.

Washington, Thompson, and Trimble, dissented; AND SO STANDS THE LAW AT THIS DAY.

The case of

MESON *v.* HAILE, 12 Wheat. 370,

at the same term, decided that the states had a right to *abolish imprisonment as a part of the remedy on pre-existing contracts*, Justice Washington, dissenting.

See

BOYLE, plaintiff in error *v.* LACHANE and TURNER, defendants in error, 6 Peters, 348.

Before this case came on for argument, Mr. Wirt in behalf of the plaintiff, (the original defendant,) inquired of the court whether the opinion of Mr. Justice Johnson, delivered in the case of *Ogden v. Saunders*, 12 Wheat. 213, was adopted by the other judges, who concurred in the judgment in that case.

Mr. Chief Justice Marshall said: "The judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws concurred in the opinion of Mr. Justice Johnson, in the case of *Ogden v. Saunders*. That opinion is therefore to be deemed the opin-

ion of the other judges who assented to the judgment. Whatever principles are established in that opinion, are to be considered no longer open for controversy, but the settled law of the court."

BRADSHAW v. ROGERS, 20 J. R. 735.

In S. Ct. id. 103.

Powers of Canal Commissioners to take Private Property.

THIS was an action of trespass brought against the canal commissioners for taking possession of a turnpike road for the use of the Erie canal, without having previously made any compensation to the owner.

The canal commissioners, under the authority of the acts of April 7, 1816, and of April 16, 1817, relative to canals, which authorized them to enter upon and occupy any lands necessary for canal improvements, had in this case, taken part of a turnpike road for the use of the canal, and had made a new turnpike road for the company over the land of the plaintiff in the court below.

The Supreme Court held the proceedings of the canal commissioners indefensible, and the act unconstitutional so far as it authorized them to take private property for public use, without providing any compensation to the owner; and that trespass would lie against their agents for entering on the plaintiff's land under their authority for such purposes.

The Court of Errors unanimously held:

1. That the act was constitutional.
2. That the authority to take public roads, or alter or discontinue any part of a public road or highway, where it interferes with the proper location or construction of the canal applies to a *turnpike* road; it being in a popular and ordinary sense, a public road or highway.
3. That where it became necessary for the canal commissioners to occupy part of a turnpike road, they or their agents might lawfully enter upon the land of any person for the purpose of making a *new turnpike road* in its place.
4. That the act of April, 1817, providing compensation to

individuals for lands taken for the canals, extends to this case.

5. That though the party whose land is taken for public use, is entitled to compensation, yet that it would seem the canal commissioners or their agents are not liable as *trespassers* for entering upon and occupying land taken for the use of the canal, *before* compensation was made to the owner, though the act of April, 1820, under which they acted, contains no provision for making compensation; but, at all events, they were not liable in *trespass* to the party, as the act of April, 1817, providing for compensation to individuals for lands thus taken, extended to cases comprehended in the act of April, 1820, as well as to those arising under former acts.

Chancellor Kent, in delivering the opinion of the court, considers it exceedingly doubtful, even if there were no mode of compensation provided for by such a law, whether the *officers of the state acting under such a law*, could be made *trespassers*. "Perhaps," he says, "in certain cases the exercise of the power might be judicially restrained, until an opportunity was given to the party injured to seek and obtain the compensation. However," he adds, "it is not necessary to give any opinion on this point."

✍ A word upon this point may be permitted us. If an act plainly unconstitutional can protect those agents of the state or individuals employed to carry it into execution from all legal responsibility for violating the right of private property, what redress has the citizen at the hands of the tribunals of justice in such cases? On what ground could a court of equity interfere, that would not be equally recognized at law? If equity interfere, because the act is unconstitutional, in authorizing the taking of private property without first making compensation, is not a court of law bound also to declare that an act of the legislature can give no right to take private property without providing for compensation? What remedy would remain if trespass would not lie against the wrong doer, or ejectment against the tenant left in by him? If the first may justify his trespass under an unconstitutional act, why not the latter protect his possession by the same title?

It is true that Chancellor Kent disclaims giving any *opinion* on this point, but the bare intimation of a doubt deserves to be noted and condemned.

This question, so far as it regards the right of *private corporations* to enter upon and take lands for railroad purposes, under the sanction of legislative authority has since been presented to the Court of Errors in the case of *Bloodgood v. The Hudson and Mohawk Railroad Company*, 18 Wend. 1. That was also an action of trespass, *quare clausum fregit*, and the court held that a plea of the authority given the defendants by their act of incorporation, to enter and take lands for their road, was bad for not averring a satisfaction or tender of the damages sustained by the owner, or that they had taken all the steps prescribed by the act of incorporation for that purpose before entry, and the judgment of the Supreme Court to the same effect, was affirmed without hesitation.

In the case of *Lyon v. Jerome*, 26 Wend. 485, where an action of trespass was brought against the chief engineer of the canal commissioners, and he justified under their authority, although the circuit judge held the justification bad, because the evidence did not show any express authority of the canal commissioners to the engineer, and that they could not delegate their power, and the point therefore made by Chancellor Kent, in *Bradshaw v. Rogers*, was not expressly decided, yet the case is amply significant of what the decision would have been, if it had become necessary to adjudicate upon it. The only members of the court who delivered opinions, Chancellor Walworth, and Senator Verplanck, seem to entertain none of the doubts suggested by Chancellor Kent.

See *Waggoner v. Jermain*, 7 Hill, 357, and 1 Hill, 279.

STEAMBOAT MONOPOLY.

NORTH RIVER STEAMBOAT COMPANY v. LIVINGSTON, 3
Cow. 182.

Reported Hopkin's R. 150, 198.

THIS case, reversing all the previous decisions of the courts of the state in support of the exclusive grant from the legislature to Fulton and Livingston, of *navigating its waters by steam*, was the last struggle in that memorable contest. An ill-judged, though well meant liberality, had given an invidious monopoly for a long term of years to the grantees, and some stringent and novel legislation had so fenced it round, that it was almost impossible to test the question of its constitutionality, without at once submitting to an enormous sacrifice. The history of the controversy is now passing into comparative oblivion; but its nature and the great principles of constitutional law involved in it, will always render it of the highest interest to American lawyers and statesmen. Although it is true, a mere wreck of the monopoly remained after the decision of the Supreme Court of the United States, in the case of *Gibbons v. Ogden*, 9 Wheat. 1, yet the waters of the state were not declared free to *its own citizens*, until the decision of the Court of Errors in this case had adopted the doctrines of the Supreme Court in that case, as equally applicable to the citizens of the state, as to those of other states. The records of this grant and consequent litigation, are full of instruction to legislators; an incautious liberality, or perhaps even a commendable spirit of munificence to a public benefactor, had imposed the most galling fetters upon the general industry and enterprise of our citizens in regard to steam navigation. The monopolists shut their eyes to the precarious tenure by which all such exclusive privileges, when they once became restraints on the freedom of competition must ever be held, under a popular government and an active commercial people.

The first step in the legislation on this subject, was a grant

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by an act passed sixty years since, (March 19th, 1787,) entitled "an act for granting and securing to John Fitch the sole right and advantage of making and employing for a limited time *the steamboat by him invented.*" The preamble to this act, recites that "whereas John Fitch, of Bucks county, in the state of Pennsylvania, hath represented to the legislature of this state, that he hath constructed an easy and expeditious method of impelling boats through the water by the force of steam, praying that an act may pass granting to him, his executors, administrators, and assigns, the sole and exclusive right of making, employing and navigating, all boats impelled by the force of steam or fire, within the jurisdiction of this state for a limited time. Wherefore, in order to promote and encourage so useful an improvement and discovery and as a reward for his ingenuity, application and diligence," the first section then grants to Fitch the "sole and exclusive right and privilege of *constructing, making, using, employing, and navigating, all kinds of boats or water craft,*" by fire or steam in the waters of the state for 14 years from the end of that session of the legislature.

The second section imposed a penalty of £100 for every violation of this right, and a forfeiture of the boats or water craft, together with the steam engine, and all appurtenances, &c., of such boats.

How far Fitch attempted to put a boat in actual operation, impelled by fire or steam, accounts at this day are somewhat obscure and contradictory. That so apparently easy an application of a motive power then so familiar to engineers and capitalists, should have stood still for so long a period after this grant, seems at this day, truly a wonder. Nothing effectual, however, having been accomplished under the grant to Fitch, in 1798, Robert R. Livingston, then Chancellor of the state, applied to the legislature for a similar grant, and although the adoption of the constitution of the United States in the mean time, had subjected the navigable waters of the several states to the commercial legislation of Congress, no notice appears to have been taken of this important cession of jurisdiction to the general government, and an act was accordingly passed on the 27th of March, 1798, granting to Robert R. Livingston the exclusive privilege of using

steamboats in all the waters of the state, for a term of 20 years, and *repealing* the grant to Fitch.

On the 5th of April, 1803, was passed a further act entitled "An act relative to a steamboat," by which the rights granted to Livingston by the act of '98, were extended to R. Livingston and *Robert Fulton* for the term of 20 years from the passage of the act, and the term for giving the "necessary proof of the practicability of a boat of 20 tons capacity being propelled by steam through the water with and against the ordinary current of Hudson river taken together, FOUR MILES PER HOUR," was also extended two years from that date. By an act of 6th April, 1808, these privileges were extended for 30 years more, and violations of them were to be punished by forfeiture of the boat, &c.

By an act of April 9, 1811, an injunction was directed to be awarded to protect the grantees. The war was not however commenced in the courts for the destruction of this monopoly, until the case of

LIVINGSTON v. VAN INGEN, 9 J. R. 507.

In that case the grantees L. and F. filed their bill in Sept. 1811, against Van Ingen, Boyd, and 20 others, reciting their grants and various provisions of the acts, and charging that the defendants had set up a boat called the Hope, and were engaged in carrying passengers for hire between the city of New York and Albany, praying an injunction to restrain the defendants from running the boat, &c., upon the ground of the provisions of the acts of 1811, authorizing such an injunction.

The Chancellor (Lansing) refused to grant an injunction *ex parte*, but granted an order that the defendants show cause at the next term; where after hearing the parties, the Chancellor decided the motion, and the plaintiffs appealed to the Court of Errors. The Chancellor's opinion is reported in the above case.

The Chancellor seems to have been reluctant to decide the questions which he propounds as to the grant being contrary to the constitution of the United States, and goes no farther than to say that the "mere propounding them must

carry conviction to every mind that the subject is involved in much doubt and difficulty, and that it is not therefore a case so plain and clear as not to admit of doubt, and accordingly he declined in that stage of the cause to grant an injunction.

After a full and elaborate argument of all these questions, the Court of Errors held the grant valid under the constitution and laws of the United States. Kent, Ch. J., Yates, Van Ness, and Thompson, delivering opinions in favor of a reversal, and the order of the Chancellor was unanimously reversed, 12 March, 1812.

But a more formidable antagonist soon after entered the lists against the monopoly, who combined with great wealth, an energy of mind, character, and passions, of a very rare description. But whatever were his motives, the aim and result of his labors were to break down the monopoly, and to open the waters of the state of New York to the citizens of other states at all events. Being a citizen of New Jersey, he resolved to test the constitutionality of the grant in the Supreme Court of the United States. This litigant was the celebrated Thomas Gibbons.

The case of

OGDEN *v.* GIBBONS, 4 J. C. R. 150,

was the result of his open defiance of the monopoly. Gov. Ogden, the grantee of Livingston and Fulton, in that case, sought an injunction against Gibbons, on the ground of his own exclusive right to navigate the waters of New York bay, between New York city and Elizabethtown Point, on which Gibbons had commenced running a boat. The defendant set up that his two steamboats were vessels above the burthen of 20 tons, and were duly enrolled and licensed under the laws of the United States, to be employed in carrying on the coasting trade, according to the laws of the United States. He also set up a title by grant from D. D. Tompkins, and others, which it is not necessary to examine, as the point was not insisted on upon the argument of the appeal in the Court of Errors.

As to the right of navigating the waters of New York under the license, Chancellor Kent said, see 4 J. R. 150 *et seq.*, there was no collision between the grant and the license. If the state laws were "not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them. We must be permitted to require at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the Supreme Power of the Union, acting upon those laws, in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that

*"Neptunus muros, magno que emota tridenti
Fundamenta quatit."*

In the Court of Errors, upon the argument of the appeal, Henry, for the appellant Gibbons, said in concluding his argument: "We do not call to our aid Neptune with his trident, we invoke only the goddess Minerva."

Platt, J., who delivered the opinion of the court said the question of the power of the state to grant such an exclusive privilege of navigating its waters had been settled in the case of *Livingston v. Van Ingen*, (*ante*), and it was no longer open for discussion.

The order of Chancellor Kent was unanimously *affirmed*.

From this decision of the Court of Errors, an appeal was taken to the Supreme Court of the United States, where in February, 1824, this great question was argued by Mr. Webster and Mr. Wirt, Attorney General, for Gibbons, and Mr. T. J. Oakley and Mr. Emmett for Ogden. 9 Wheat. 1-240.

The counsel for Gibbons contended:

1. That the power to regulate commerce, vested in Congress by the constitution, was complete and entire, and to a certain extent, necessarily exclusive.
2. That the grant in question came in direct collision with this exclusive power. The appellant had a right as a citizen of New Jersey, to go to New York in his vessel enrolled and licensed according to the laws of the United States. It was a right derived from those laws, and no legislation of a state could deprive him of it.
3. That the power of Congress to secure to authors and inventors a limited and exclusive right, was also an exclu-

sive one, and the power could not be properly exercised by a state.

The counsel for the respondents contended :

1. That the power to regulate commerce was *concurrent*.
2. That the laws in question were only a regulation of the internal navigation of the waters of the state, and therefore belonged *exclusively* to the state.
3. That the business of *carrying passengers* in which the appellant was engaged, was not covered by his coasting license.

In the conclusion of his argument, Mr. Emmett adverted in eloquent and characteristic terms to circumstances connected with those laws, which should make any tribunal require the strongest arguments before it adjudged them invalid. "The state of New York," he said, "by its patronage and liberality to Livingston and Fulton, has called into existence the noblest and most useful improvement of the present day. Genius had contended with its inherent difficulties for generations before; and if some had nearly reached, or some even touched the goal, they sunk exhausted, and the result of their efforts perished in reality, and almost in name. Such would have been the fate of Fulton, in all probability, but for this wise and considerate encouragement of the state of New York. She has brought into noonday splendor an invaluable improvement to the intercourse and happiness of men. The benefits of the policy have spread themselves over the union. The Ohio and Mississippi she has converted into rapid channels for communicating wealth, comforts, and enjoyments, from their mouths to their headwaters. And the inhabitants of the states washed by these streams, may well ask themselves whether next to the constitutions under which they live, there be a single blessing they enjoy from the art and labor of man, greater than that they have derived from the patronage of the state of New York to Robert Fulton? But the mighty benefits that have resulted from those laws are not circumscribed, even by the vast extent of our union. New York may raise her head—she may proudly raise her head—and cast her eyes over the whole civilized world; she there may see its countless waters bearing on their surface, countless offsprings of her munificence and

wisdom. She may fondly calculate on their speedy extension in every direction and through every region from Archangel to Calcutta, and justly arrogating to herself the labors of the man she cherished, and conscious of the value of her own good works, she may turn the mournful exclamation of Æneas into an expression of triumph, and exultingly ask,

' Quæ regio in terris nostri non plena laboris ? ' "

The Attorney General, Mr. Wirt, in concluding his speech in this cause, thus retorted the classical quotation of Mr. Emmett upon him.

" His learned friend had eloquently personified the state of New York casting her eyes on the ocean, witnessing everywhere this triumph of her genius, and exclaiming in the language of Æneas, &c.

" It was not in the moment of triumph, nor with feelings of triumph, that Æneas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the works of art with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes, the loss and desolation of his friends, the fall of his beloved country, rush upon his recollection.

' Constitit et lachrymaus, quis jam locus inquit, Achate, Quæ regio in terris nostri non plena laboris ? ' "

" The passage may hereafter have a closer application to the cause than my eloquent and classical friend intended. For if the state of things which has already commenced is to go on ; if the spirit of hostility which already exists in three of our states is to catch by contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests, it will too surely do, what are we to expect ? Civil wars have arisen from far inferior causes, and have desolated some of the fairest portions of the earth. Here are three states almost on the eve of war. The war of legislation which has already commenced, will, according to its natural course, become a war of blows. Your country will be shaken with civil strife.

" Then, sir, when New York shall look upon this scene of

ruin, if she have the generous feelings I believe her to have it will not be with her head aloft, in the pride of conscious triumph, her rapt soul sitting in her eyes—no sir, no—dejected—with shame and confusion—drooping under the weight of her sorrow, with a voice suffocated with despair, well may she then exclaim,

“ *Quis jam locus,*

Quæ regio in terris nostri non plena laboris ?

Marshall Ch. J., delivered the opinion of the court, and of all those which bear his name on constitutional questions, it would be difficult to find one more closely reasoned and more conclusive. Our very brief summary can render it but little justice. The reader must have recourse to the opinion itself, if he would comprehend the close chain of induction which distinguishes it.

It clearly establishes by a variety of arguments and illustrations :

1. That the power to “regulate commerce” necessarily comprehends navigation.

2. That the exceptions or inhibitions to the exercise of that power over navigation in a particular manner, proved that the previous grant was understood by those who granted it, to include the general power to its fullest extent, except as restrained by those limitations.

3. That “commerce among the several states,” comprehends every species of commercial intercourse ; that the word *among* means intermingled with ; and that the power to regulate such commerce does not stop at the external boundary line of each state, but follows it into the interior.

4. That the grants to Livingston and Fulton were in derogation of the act of Congress regulating the coasting trade, and therefore void, and that the license to carry on the coasting trade is an authority confirmed by the supreme legislative body of the Union, and that a coasting vessel employed in the transportation of passengers, is as much employed in *commerce* as one engaged in transporting a cargo.

5. That this power of regulating the coasting navigation, extends as well to steam vessels as to any other mode of propulsion.

The decreë accordingly declared that “so much of the laws

of New York as prohibits vessels licensed according to the laws of the United States from navigating the waters of the state of New York by means of fire or steam, is repugnant to the constitution of the United States, and void."

THE NORTH RIVER STEAMBOAT COMPANY v. JOHN R.
LIVINGSTON, Hopkins, 149-150.

AFTER the decision of the case of *Gibbons v. Ogden*, in the Supreme Court of the United States, the defendant Livingston equipped a steamboat called the "Olive Branch," which he caused to be enrolled and licensed, and with which he proceeded from the city of New York to Jersey City on the opposite shore, and after landing two boxes of goods and some passengers there, pursued his course to Albany. The company made an application for an injunction, and the defendant set up his coasting license and these facts in his defence.

The opinion of Chancellor Sanford, was in favor of the validity of the grant to L. and F. so far as navigation from port to port within the state by its own citizens, was concerned. He held that the termini of the voyage fix its character, as being or not subject to the state grant, and that a steam vessel having a license, and proceeding from a port in this state, may by touching at a port in an adjoining state, continue the voyage to any other port in this state. He held also that the intention to evade the state grant by such a navigation, would not affect this right, and denied the injunction on that ground only.

The plaintiffs on leave granted amended their bill so as to charge that the defendants first stopping at Jersey City was fraudulent and collusive, and intended to evade the operation and effect of the laws of this state, and not for any *bona fide* purpose of commercial intercourse; and that since her first trip, although she had performed upward of 50 passages between the cities of New York and Albany, yet she never had in the course of any of them, stopped at, opposite or adjoining, any port or place in New Jersey, but had

prosecuted her voyages direct from a wharf in the city of New York to a wharf in the city of Albany, and stopping at intermediate places. The bill prayed an injunction against such direct intercourse, and all such indirect intercourse by way of New Jersey, unless in the prosecution of a *bona fide* voyage or commercial intercourse with New Jersey, and not for the purpose of evading the laws of this state relative to steamboats.

The Chancellor refused the injunction, so far as the navigation to or from another state was concerned, but granted it to restrain the defendant from navigating that vessel between the cities of New York and Troy, when there was no voyage to or from another state. From the part of the order refusing the injunction against the indirect intercourse, the plaintiffs appealed to the Court of Errors, and upon the argument, the whole question, after some discussion between the counsel, was declared by the court to be open, although the respondents had not appealed from the part of the order allowing the injunction, within the fifteen days allowed by the statute.

The cause was then argued at large. Woodworth, J., delivered an opinion in favor of reversing that part of the decree appealed from, and granting the injunction against the boat, when there was no voyage made in good faith to another state, with which Sutherland, J., and 7 Senators, concurred.

Savage, Ch. J., delivered the opinion of the majority of the court, and discussed the claim of the plaintiffs to any exclusive right of navigation by steam in the *waters of the state*. He held that the case of *Livingston v. Van Ingen*, was not a binding authority on the court, inasmuch as the controversy there was not upon the effect of a coasting license, no such fact appearing in the case. After restating the points decided by the Supreme Court of the United States, in *Gibbons v. Ogden*, he says: "From these premises, it seems to me to follow as a corollary, that vessels with a coasting license are authorized to navigate for the purpose of carrying on the coasting trade, in all the navigable waters of the state, in which the coasting trade can exist." In commerce among the several states, subject to the control of Congress, he held

the coasting trade to be included, and the transportation of passengers to be a branch of that trade: that "there could be no pretence for denominating the grant as a ferry from Albany to New York.

"To speak of a ferry from Albany to New York, is as great an abuse of terms, as to talk of a ferry from New Orleans to Pittsburgh, or even from New York to Liverpool." The decree of the Chancellor was then affirmed by a vote of 22 to 9, and this monopoly after sixteen years of feverish existence, was annihilated for ever.

FOREIGN CONSUL.

PACKARD *v.* DAVIS, 6 Wend. 327-334.

DAVIS *v.* PACKARD, 10 Wend. 50-74.

In S. Ct. of U. S. 6 Peters, 41-50, 7 Peters, 276-286.

CHARLES A. DAVIS, the plaintiff in error, was sued in the Supreme Court on a *recognizance of bail*, entered into by him in a civil suit. A verdict was found, and judgment rendered against him thereon. He then removed the record into the Court of Errors, and assigned for error, that at the time of the commencement of the suit against *him*, he was, and ever since has been, *Consul General* of the King of Saxony, in the United States, duly admitted, &c., by the President of the United States, and ought not to have been impleaded in the Supreme Court of the state of New York, but in the District Court of the United States for the Southern District of New York, or in some other District Court of the United States, and that the Supreme Court had not jurisdiction, &c.. Defendant in error pleaded in *nullo est erratum*, &c.

The Court of Errors, (the Chancellor, Walworth, delivering the opinion,) held: 1. That the suit on the *recognizance* was a mere incident to the original suit, and therefore the Supreme Court had jurisdiction without regard to the official character of the defendant. But if not—then 2. That the party by

pleading in chief to the suit, and calling for a decision on the merits, without setting up his privilege, had admitted the jurisdiction of the court; and 3. That the Court of Errors will not entertain jurisdiction to reverse a judgment of the Supreme Court for a mere *error in fact*, which might have been tried there upon a writ of error *coram nobis*.

The Chancellor says: "I am therefore satisfied that this court never had jurisdiction to reverse a judgment of the Supreme Court for *error in fact*, unless the question had first been examined and decided upon a writ of error, *coram nobis*, in that court, 2 Wend. 157, 4 id. 175.

The Court of Errors being *unanimously* of this opinion, the judgment of the Supreme Court was affirmed accordingly. Whereupon the plaintiff in error, sued out a writ of error to the Supreme Court of the United States. At the January term of that year, 1832, a motion was made to dismiss the writ of error, "for want of jurisdiction in that court." 6 Peters 41-50. The case is there entitled "*Charles A. Davis, Consul General of the King of Saxony*, plaintiff in error, *v. Isaac Packard, Henry Disdier, and William Morphy*, defendants in error.

Thompson, J., delivered the opinion of the court.

"The motion to dismiss the writ of error, is founded and resisted on affidavits of what took place in the Court of Errors of New York, on a motion there made to dismiss the writ of error to the Supreme Court of that state; and the opinion of the Chancellor assigning his reasons for affirming the judgment of the Supreme Court, has also been laid before us.

"We can not enter into that question at all; whatever forms no part of the record sent up to this court, must be entirely laid out of view.

"The question before this court is not, whether the judgment of the Supreme Court in New York, was correct. It is the judgment of the Court for the Correction of Errors, that is to be reviewed here. From the record, then, we are necessarily left to conclude that the state court, (the Court of Errors,) assuming or admitting the fact that Davis was Consul General, as alleged in his assignment of errors, yet held it did not exempt him from being sued in a state court; which

brings the case within the 25th section of the judiciary act, the decision being against the exemption claimed under a law of the United States." The motion to dismiss the writ of error was accordingly *denied*.

The writ of error was afterward brought on for argument at the January term, 1833, and the cause heard and decided; 7 Peters, 276-286.

The opinion of the court was delivered by Mr. Justice Thompson, who after stating the case, says:

"The principal difficulty in this case, seems to grow out of the *manner* in which the exemption set up by the plaintiff in error, was brought under the consideration of the state court, and in a right understanding of the ground on which the court decided against it.

"The record shows no objection to the time and place, when and where this matter was set up."—"The only answer is that *there is no error; because it nowhere appears in the record, that the said C. A. D. ever was Consul of the King of Saxony*. This was no answer to the assignment of errors. Matter assigned in the appellate court as *error in fact*, never appears upon the record of the inferior court. If it did it would be error in law. But the answer to the assignment of errors, prays that the court may proceed to examine the record, &c., and *the matters aforesaid above assigned for error*.

"Under this informal state of the pleadings in the Court for the Correction of Errors, how is this court to view the record? If it had been intended to say that it was not error, because not pleaded in abatement, it would probably have been so said."—"As the record contains no intimation that this matter was not set up in proper time, the conclusion would seem irresistible, that the Court for the Correction of Errors considered the matter itself, set up in the assignment, as insufficient to reverse the judgment. This being the only question decided in that court, is the only question to be decided here; and viewing the record in this light, we can not but consider the judgment of the state court in direct opposition to the act of Congress, which excludes the jurisdiction of the state courts in suits against consuls.

"But if the question was open for consideration here,

whether the privilege claimed was not waived by omitting to plead it in the Supreme Court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be some grounds for such a conclusion; but it can not be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and laws seem to put Consuls on the same footing in this respect."

Judgment *reversed* accordingly.

A MANDATE from the Supreme Court of the United States, in the usual form, in the name of the President of the United States, to the President of the Senate of the state of New York, the senators, Chancellor, &c., containing the judgment of *reversal*, and commanding them "that further proceedings be had as according to right and justice, and in conformity to the opinion and judgment of said Supreme Court of the United States, and the laws of the United States, ought to be had, &c., was produced to the court on the behalf of the plaintiffs in error.

On presenting this mandate to the Court of Errors, the counsel for the plaintiff in error moved that a rule be entered reversing the judgment of this court and of the Supreme Court. At the same time a motion was made by the counsel for the defendants in error, *either* that the rule to be entered on the filing of the mandate should declare that they had not jurisdiction to reverse the judgment of the Supreme Court in such case, and therefore declined to do so—or that the court in case they should reverse their own judgment of affirmance, in obedience to the mandate, should at the same time enter an order *for the dismissal* of the writ of error *with costs*.

This question was elaborately argued by the Chancellor and Justice Sutherland, in favor of a judgment simply reversing their own previous judgment, and leaving that of the Supreme Court in force. Seward, senator, delivered an opinion *contra*. The court was induced to adopt the form of the judgment drawn up, and offered by the Chancellor, *reversing* the judgment of the Court of Errors itself, and leaving that

of the Supreme Court in full force; also *quashing the writ of error* from the Supreme Court to the Court of Errors, with costs to the defendant in error, and remitting the proceedings to the Supreme Court.

In the affirmative for this judgment, 20, *contra* 3.

✎ It can not be denied that this was a virtual disobedience to the mandate. It is true Mr. Justice Sutherland says "that there is no disposition to obstruct or evade the judgment of the Supreme Court of the United States," but the rule or order entered is nothing more or less than a refusal to treat the judgment of the Supreme Court as *reversed* on the question of jurisdiction, and to still maintain that the defendant in error should have another opportunity to present this question to the Supreme Court of the United States.

See rule for judgment and opinions, 10 Wend. 52-74.

BLOODGOOD, plaintiff in error *v.* MOHAWK and HUDSON RAILROAD COMPANY, 18 Wend. 1.

Reported 14 Wend. 548.

ERROR from the Supreme Court. Trespass *quare clausum, &c.*, by Bloodgood against Railroad Company for entering and taking premises for their railroad.

The defendants justified under their act of incorporation, and the Supreme Court held their plea of justification good, although it did not aver that they had tendered or made satisfaction, or taken the steps prescribed by their act of incorporation, to assess and satisfy the damages sustained by the owner.

The Court of Errors *reversed* the decision as to that point, but held the power conferred on the company to take private property for that purpose to be constitutional. The judgment of the Court of Errors, as entered, exhibits their result and the grounds of it, at the same time, briefly stated in their judgment itself; a precedent to which it would be well if every court of appellate jurisdiction conformed in every instance of *reversal*.

The judgment as entered was as follows:

"Counsel having been heard in this cause, and due deliberation had, it is declared and adjudged that the legislature of this state has the constitutional power and right to authorize the taking of private property for the purpose of making railroads, or other public improvements of the like nature, paying the owners of such property a full compensation therefor, whether such public improvements be made by the state itself, or through the medium of a corporation or joint stock company; but that by the true construction of the defendant's charter or act of incorporation, they were not authorized to take and appropriate the plaintiff's land to their use, until his damages were appraised and paid or deposited for his use, as provided for in the act of incorporation."

Judgment *reversed*, 2d plea overruled, with leave to defendants to amend their plea within such time as the Supreme Court should direct, on payment of costs to be taxed, &c.

CLARK v. THE PEOPLE, 26 Wend. 599, 613.

Not reported in S. Ct.

Quo Warranto; Appointment of Justices of Peace, in Cities.

THE Supreme Court in this case delivered no formal opinion on the question involved, viz., whether the legislature have power under the 15th section of the 4th article of the constitution, (of 1821,) to *direct the mode* of appointing *justices of the peace for cities*, but merely referred to their opinion in *The People v. Kane*, 23 Wend. 414, where they held that the legislature had not the power. But on writ of error in this case,

The Court of Errors held, that the legislature had the power, and that the decision of the Supreme Court that "the act providing for the appointment of justices of the peace by the common council of *Rochester*, was unconstitutional and void," was erroneous, and their judgment in this case was

reversed by an almost unanimous vote; (two senators only voting to affirm.)

N. B. The case of *The People v. Kane*, was held to be rightly decided, without reference to the constitutional question; (see p. 601, per the Chancellor; and p. 612, 613, per Senator Ely;) as the law under which Kane had been appointed, was *repealed* before his appointment.

PURDY v. THE PEOPLE, 4 Hill, 384-419.

In S. Ct. 2 Hill, 31-44.

Quo warranto; Charter of the City of New York.

INFORMATION in the nature of a *quo warranto* against the defendant for exercising the office of *judge* of the Court of General Sessions in the city of New York. The information was filed, June 15, 1840, and alleged the usurpation from the 1st of that month. The defendant pleaded his election to the office of alderman of the 10th ward of the city of New York, on the 2d Tuesday of April, 1840, for one year; that he entered on the duties of the office on the 12th of May, following; and then insisted on his title as alderman, under the city charter of 1730, the confirmatory act of 1732, the act of 1830, and the revised statutes, to sit in the Court of General Sessions of the peace, in and for the city and county. The Attorney General demurred, and the defendant joined in demurrer.

The Supreme Court held, that the act of May 14, 1840, annulled the power conferred upon aldermen of the city of New York by the charter of 1730 to officiate as judges of the Court of General Sessions, of the city and county of New York; that the act was valid, though passed by a vote of less than *two thirds* of the members elected to each branch of the legislature.

Cowen, J., held, that as the act did not interfere with any right of a strictly *corporate* character, it was not a *two third* act.

Nelson, Ch. J., for reasons expressed by him in *The People v. Morris*, (13 Wend. 325,) held that the two third clause of

the constitution did not extend to *municipal corporations*, and gave judgment of ouster against the defendant, Bronson, J., dissenting on both grounds; and further holding, that where the point is raised as to the actual vote of two thirds on the passage of a bill, is the original engrossed bill on file in the secretary of state's office, if not *certified* pursuant to the statute as having been passed by a two third vote, that is at least *prima facie evidence*, that it was not so passed.

The Court of Errors held, that the *two third* clause of the constitution (of 1821) extended to *all corporations*, properly so called, (under the terms "any body politic or corporate,") whether they be public or private; and that the act of May 14, 1840, not having received the assent of two thirds of the members elected to each branch of the legislature, it is void so far as it affects the right of aldermen of the city of New York to sit as judges of the Court of General Sessions of the peace.

The Chancellor in concluding his opinion for *affirmance*, says: "The fact that one of the sections of the act of May, 1840, is admitted to be in direct conflict with the provisions of the constitution, does not render the other parts of that act inoperative and void." And this seems to have been acquiesced in by the Court, as no members of the court who delivered opinions for *reversal* maintained the contrary doctrine.

Judgment reversed 13 to 11.

COVENANT TO STAND SEIZED.

JACKSON *ex dem.* HOUSEMAN *v.* SEBRING, 16 J. R. 515.

Covenant to stand Seized; Deed of Bargain and Sale.

IN this case, where a deed by a married woman and her husband of her lands to a trustee, a stranger, reciting that "she inherited the premises which she wished to settle in the manner therein after mentioned, and in consideration of the

premises, and for divers other good causes and considerations, granted, bargained, sold, &c., to D., (a stranger,) his heirs, &c., *in trust*, to hold the same during the joint lives of herself and her husband, and to pay them the rents and profits, &c. And in case the husband should die, leaving her surviving, to convey the same to her, but in case she should die, without lawful issue, leaving her husband surviving her, then in trust to convey the premises to her said *husband* and her mother as tenants in common, in fee simple;" and D. covenanted to perform the trust. The wife died without lawful issue, leaving her husband and mother surviving, to whom D. afterwards conveyed the premises in pursuance of the trust.

The Supreme Court held, that the deed was not good as a bargain and sale, for want of a pecuniary consideration, but that it might be sustained as a covenant to stand seized to uses on the part of the trustee, though a stranger to the blood of the grantors and grantees.

The Court of Errors held on the other hand, that no use can be raised on a covenant to stand seized, in favor of a *stranger* or one not of the *blood* of the covenantor, though the *covenantee* is a mere trustee for the relations of the blood of the covenantors, it makes no difference; that the deed from the husband and wife to the trustee, was void for want of a pecuniary consideration; and that it could not operate as a covenant to stand seized to the uses expressed in the deed, because the trustee being a mere stranger, there was no consideration of *blood* or *marriage*, between him and the grantors to raise the use, and create a seisin in him by force of the statute of uses.

DAMAGES.

GLEASON v. PINNEY, 5 Wend. 393.

In S. Ct. 5 Cow. 152.

Damages; Note Payable in Salt; Writ of Error; Restitution.

THIS case was reported in Supreme Court, as a case of *affirmance* of the judgment of the Common Pleas, where the suit was commenced, and which held that the amount *in money* was the proper rule of damages in an action on the following note:

"For value received, I promise to pay John Pinney \$73 50, on the first day of August, 1822, in salt at 14 shillings per barrel, in good boatable order. Liverpool, June 30, 1820.

Asa Gleason.

The Supreme Court, however, (Savage, Ch. J., *dissentiente*,) reversed this judgment of the Common Pleas, holding the *value of the salt* at the time for delivery to be the proper measure of damages, and awarded a *venire de novo*. The opinion of Savage, Ch. J., given in 5 Cow. 152, as that of the court, was his dissenting opinion. See reporter's note, 5 Cow. 411, correcting the error.

In the mean time Pinney had collected his judgment below; Gleason then took a writ of restitution, and an execution for his costs in the Supreme Court, and the money collected by Pinney on his judgment in the Common Pleas, was restored to Gleason, and his costs in Supreme Court paid. Gleason then compelled Pinney by a rule in the Common Pleas, to go to trial on the *venire de novo*, awarded by the Supreme Court on reversal, who went on accordingly, and obtained a second verdict and judgment against Gleason. Pinney then brought a writ of error from the judgment of the Supreme Court, reversing the original judgment in the Common Pleas, and awarding a *venire de novo*.

A motion *to dismiss the writ of error*, was now made to the Court of Errors on this state of facts, but the court held that Pinney had a right to his writ of error to the judgment of the Supreme Court, and that his going to trial upon the rule in the Common Pleas, was no waiver of his right to bring error, and the motion to dismiss his writ of error was denied.

And per Jones, Chancellor. "A reversal of the judgment in the Supreme Court, will be a reversal of all the consequent proceedings including those in the Common Pleas, upon the *venire de novo*." Accordingly,

This cause on the writ of error to that judgment of the Supreme Court was brought to argument before

The Court of Errors, on the question as to the rule of damages, and the court held that the measure of damages for non-payment of the note was the *sum* specified in the note and *not* the value of the *salt* on the day specified for the delivery or payment.

And the judgment was *reversed*.

DEED.

JACKSON *ex dem.* ERWIN v. MOORE, 4 Wend. 58.

In S. Ct. 6 Cow. 706.

Deed; Construction of Grant; Boundaries and Description; Evidence.

THIS was an action of ejectment, and the case arose upon the construction to be given to a conveyance of two certain tracts of land described as follows: "Two tracts or parcels of land lying, &c., being township No. 3, &c.; also township No. 4, &c.; *to be* 6 miles square, and containing 23,040 acres each, and *no more*, &c." The two tracts referred to, were in fact 6 by 8 miles in size.

The Supreme Court held, that the whole 6 by 8 miles in each tract passed to the grantee by this conveyance. The court considered the description of the parcels as a mere ref-

erence to or designation of the premises intended to be conveyed, and that in the description by the boundaries, or number of the lot, or other certain designation, the mention of the quantity in addition must be taken to be mere description, there being no express covenant that the land contains that quantity; and the quantity being the least certain part of the description, must yield to boundaries, or the number of the lot, or other more certain description; that effect should be given, if practicable, to every part of the description; that if the thing intended to be granted appear clearly from any part of the description, and other circumstances not applicable, are mentioned, the grant will not be defeated, but the erroneous part will be rejected; that the description was not ambiguous in a legal sense, so as to be a subject of explanation from extrinsic evidence.

It was also held by the Supreme Court, that the acts of a portion of the grantees, tenants in common, in locating land under a deed, will not affect their co-tenants, unless it appear that the latter sanctioned the acts in some way or manner. Also held by the Supreme Court, that the court will not presume a grant for the purpose of quieting ancient possession.

But the Court of Errors reversed the judgment of the Supreme Court, on the ground that it was the manifest intention of the parties that the townships should be but "*six miles square, and contain twenty-three thousand and forty acres, and no more.*" The court held therefore, that the township should be re-surveyed, and a correction made of the boundaries, so as to reduce each township to 6 miles square, and to the contents specified in the deed.

It was also held, that the grantees would have a right of election to locate their grant in any part of the two townships as surveyed at the date of the deed, the only restriction being to locate in a square form.

Judgment unanimously *reversed*.

The Chancellor in delivering his opinion, observes that "the judges of the Supreme Court appear to have supposed the verb '*to be*,' as having been inserted instead of the participle '*being*,' by the conveyancer, who copied the description from one in existence before the townships were surveyed."

The Chancellor denies the right of that court to resort to

such evidence to ascertain the meaning of words, which are clear and positive on the face of the deed.

VAN WYCK *v.* WRIGHT and JOHNSON, 18 Wend. 157.

Case not reported in Supreme Court, but opinion of that court by Nelson, J., 18 Wend. 162-4. See also *Jackson ex dem. Johnson v. Tallmadge*, 4 Cow. 450, post. 128.

Deed; Map; Survey under Authority of Surveyor General; Practical Locations or Land Marks.

EJECTMENT by Van Wyck against Wright and Johnson, for a tract of land in Tompkins county. Both parties claimed title to the land in question under Robert C. Johnson, grantee of Greenleaf, the original patentee from the state; the plaintiff claiming the disputed tract as grantee of the southwest quarter section, and the defendant as grantee of the northwest quarter section of township No. 10. The defendant claimed title under his deed, according to the line on the *map* filed in the Surveyor General's office, by whose authority the town and section lines were run, and the map made and filed in his office in 1791. The plaintiff claimed to recover the disputed tract according to a line actually run by a *sub-surveyor*, acting under the orders of the Chief Surveyor, employed by the Surveyor General. The *sub-surveyor*, and his assistants under these directions, proceeded to survey the lines of the township No. 10, and its sections, but instead of pursuing the lines as given to them, proceeded some forty chains further on the north course than they should have done. The mistake having been discovered by the surveyor after a part of the section line had been thus run, and the trees marked and *blazed*, &c., the Chief Surveyor sent orders to Sabin the deputy, to correct the line as run, and to conform it to the proper course. Sabin, instead of going back to the point of departure beyond the true line, made an *offset* from the line as he had run it already, to the true line, and then proceeded to run and mark the residue, according to the map in the Surveyor General's office. That map was made out upon the supposition that the *whole* line had been

run correctly. This produced a difference between that part of the line on the map, and the actual line as marked on the land. This plat constituted the land in question.

In the year 1799, Robert C. Johnson, who had become the grantee of the township by conveyance from Greenleaf, was apprised of this mistake by a surveyor named Pumpelly, who then under Johnson's directions proceeded to run out the true line according to the map, and to obliterate the old one. In 1806 or 1807, a tenant took possession up to the map line, under title derived from a son of Johnson. Van Wyck, who claimed according to the actual Sabin line, under a deed from Johnson, before the correction was made, some time after commenced an action of ejectment against the tenant, which resulted in a verdict in favor of the tenant. The disputed line however remained unsettled, and tenants from 1806 or '7, occupied part of the tract, claiming title. Van Wyck, however, after the termination of his action of ejectment, gave directions to his agent not to sell any more lands *north* of the map line, and for several years previous, did not pay the taxes on the land. In 1820, Wright, one of the defendants, having entered into possession of part of lot No. 46, (as claimed by Van Wyck,) and occupying it to the map line, Van Wyck, in 1830, commenced this suit against him. His landlord, Johnson, the other defendant, became a party to defend the suit.

At the trial, the counsel for the plaintiff desired the judge to charge the jury that "*the actual marked lines* on the land, and *not the map*, must control in the decision of the case," but the judge declined so to do, and charged that "if the line run by Pumpelly, (the *map line*,) was a mere continuation of the Sabin line, from the *jog or offset*, it was the same thing as if it had been run or continued by Sabin himself, and would then be true line, and control the parties in this suit." Exception and verdict for defendant according to the charge. On motion for a new trial,

The Supreme Court refused a new trial. Nelson, J., delivering the opinion of the court, (see 18 Wend. 162-4,) says, "without going into a minute examination of the facts disclosed in this case, it is entirely clear that the line claimed by the plaintiff to be the true east and west line, between the

quarter sections of township No. 10, was originally run and marked through mistake, and was obliterated and abandoned when the mistake was discovered."—"But it is said that the (Sabin) line is clear and perfect through the sections of lot No. 10, and that the purchasers of these sections are bound by it; though as a line *dividing east and west* this tier of townships on the tract, and for which purpose it was run, it was also abandoned.

"It was not understood or believed at the trial of *Jackson v. Johnson*, 4 Cow. 450,* that this line of itself was conclusive upon the parties, nor is any such opinion intimated or

* By the case of *Jackson v. Johnson*, 4 Cow. 450,) as cited above by Justice Nelson, is meant the case there reported under the correct title of *Jackson ex dem. Johnson and others v. Tallmadge*, 4 Cow. 450. The same question on the same facts, in substance there arose.

That was an action of ejectment by Johnson, the defendant in this case, to recover a part of the same disputed premises against a defendant claiming under the *ground* line. The cause was tried in 1823, before Nelson, Circuit Judge, who *then* charged the jury in *favor of the ground* line and against the *map* line, and the jury found a verdict for the defendant. On the motion for a new trial, the following opinion was delivered by

"Savage, Ch. J., who after stating the facts, adverted to and relied on *Jackson v. Freer*, (17 J. R. 31.) He said the question there as stated by Spencer, Ch. J., was "which shall prevail, the actual location of the lots on the ground, by marking and numbering trees at the corners, and by marking the lines of the lots?—or, the courses and distances which the *map* represents the lots as entitled to?" The court decided in favor of the actual location. The *survey* was considered as the *act of the parties*, though made by the agent of the Surveyor General, as in this case. In *Jackson v. Ogden*, (7 J. R. 241,) it was said that where the map and survey do not agree, a practical location, *acquiesced in*, is entitled to great weight.

"In this case, the evidence of acquiescence in the location by the lessors of the plaintiff, was not very conclusive; and further testimony on it might have been satisfactory. Such was offered after the counsel had commenced summing up, but rejected. It was, doubtless, discretionary with the judge to receive or reject it; and I can not say that his discretion was not properly exercised. From the case as it stands, I think a new trial should be refused." New trial denied.

☐ It is believed that the learned reader who shall attentively examine the facts and circumstances of the foregoing case, and the cases of *Jackson v. Hunter*, 1 J. R. 495; *Jackson v. Cole*, 16 id. 257; and *Jackson v. Freer*, 17 id. 29; will hesitate before he assents implicitly to the conclusions of the Chancellor in *Van Wyck v. Wright and Johnson*. In one thing he is most cer-

expressed by the Chief Justice at bar. It was decided upon the ground frequently considered and approved by this court, that where the *marked* line has been erroneously run, and the one on the *map* and in the *field* book is correct, and there has been an actual location and possession for years, according to the *ground* line, acquiesced in by the adjoining owners, the latter shall not be allowed even to correct the line, and thereby break up such line and deprive the party of his improvements, and this principle aside from any other, is conclusive against the plaintiff. For, if a location and possession acquiesced in for years, upon an *erroneous* line of marked trees, will prevail over the true one given by the map and field book, can it be pretended that a like *possession* and *acquiescence* according to the *true* line of the map and field book, will not prevail over an *erroneous ground line*. The defendant, Wright, has been in possession upward of 12 years under this line." A new trial was accordingly denied, and the plaintiff now brought error.

The Court of Errors *reversed* the judgment of the Supreme Court, Walworth, Chancellor, delivering the only opinion reported. He says, in the course of it, after stating that the only important question in the case is: "Whether the deed from Robert C. Johnson, to Suydam, (in 1795,) from whom the plaintiff derives title, conveyed the southwest quarter of township No. 10, as the same was actually run and marked upon the land *at the time of conveyance*, or only conveyed it as it would have been run if Sabin *had run the line back* from where he made the offset, $6\frac{1}{4}$ miles west of this section?"

"What would be the first legal resort of the grantee (Suy-

tainly mistaken. He asserts that the case of *Jackson v. Hunter* was overruled in the case of *Jackson v. Cole*. But is this so? Let Spencer, Ch. J., who delivered the opinion of the court, decide the question. He says, (16 J. R. 263,) "I am free to declare that upon further consideration, I am satisfied that the opinion delivered in *Jackson v. Hunter*, can not be supported; and that it was founded upon too narrow a view of the act; (act in relation to military lands of 6th April, 1790.) I am not authorized to say that my brethren fully and explicitly renounce the opinion delivered in *Jackson v. Hunter*, though I understand them to incline to consider it incorrect. *They do not consider this case as requiring them expressly to overrule that case.*"

dam) and those claiming under him, to ascertain and locate the premises thus granted? Certainly it was to ascertain if the two quarter sections granted were actually run out and marked or located upon the land at the time of the conveyance, bounded in the manner described in the deed. And certainly there can be no doubt whatever, that if the purchaser had gone to the land at the time he took the conveyance, or before, and such is the legal presumption as to the *location calls* in the deed, he would have found every quarter or section adjoining the two conveyed to him actually located on the land, and those on the north and east and West, with their corners distinctly marked on the Sabin line."—"It would have been necessary for him to travel $6\frac{1}{2}$ miles from the lands granted to him, to have found the *obliterated* corner upon the north line of No. 6, even if he had had an intimation that there was a mistake. Such a constructive notice of a mistake it would be very unreasonable to enforce against the settlers in a new country."—"Again; this quarter or section had been actually subdivided into lots bounding upon the Sabin line before the conveyance to Suydam." "The other undivided half of this section was conveyed to the plaintiffs with express reference to it."

Judgment reversed 12 to 6.

CHILD and others v. STARR and others, 4 Hill, 369, 383.

In S. Ct. 20 Wend. 149.

Boundaries ; Riparian Owner of Lands.

Ejectment. The Supreme Court held, in this case, where in the conveyance of premises situated on the bank of a river *not navigable*, the lines are stated to run from one of the corners of the lot *to the river and thence along the shore of said river to a certain street* the grantee takes *ad filum aquæ*. Justice Bronson, *dissentiente*.

The Court of Errors held, that no part of the bed of the river passed under the conveyance, but that the grantee took only to low water mark.

Walworth, Chancellor, delivered an opinion for reversal

"The decision of a majority of this court in the case of *The Canal Appraisers v. The People*, ex. rel. *Tibbits*, (17 Wend. 590,) although put upon other grounds by some of the members who voted for a reversal of the judgment of the Supreme Court, cast a shade of doubt upon the question, whether the common law rule prevailed here as to the construction of conveyances of lands bounded by or upon a river or stream above tide waters. That doubt, however, is probably removed by the recent decision of this court in the case of *The Commissioners of the Canal Fund v. Kempshall*, (26 Wend. 404,) in which the judgment of the Supreme Court in favor of the riparian owner was unanimously affirmed. The common law rule as I undersand it, is that the riparian proprietor is *prima facie* the owner of the *alveus* or bed of the river adjoining his land, to the middle or thread of the stream; that is, where by the terms of his grant, he does not appear to be limited. It appears to me equally clear, that the grant is restricted, where it is bounded by the *shore* of the river, as in the present case.

Judgment *reversed*; for *reversal* 11, for *affirmance* 10.

CONSTANTINE v. VAN WINKLE, 6 Hill, 177.

In S. Ct. 1 Hill, 240.

Deed by Husband and Wife of Wife's Estate; Acknowledgment of Wife.

EJECTMENT by Van Winkle in the court below.

The defendant Constantine claimed the premises in controversy, by virtue of a deed executed in May, 1760, by John Van Winkle and Jane his wife, to one J. V. W. from whom he derived title. The property belonged to Jane the wife; the deed was witnessed by two witnesses, but did not appear to have been acknowledged in any form by either of the grantors. The possession of the premises had been ever since 1760, either in the grantee, or those claiming under him as owners. The plaintiff claimed title by a deed executed in 1811, as heir at law of one quarter, and by virtue of a deed from his sister of her share.

Jane the wife died in 1796, and her husband in 1816. The suit was brought in 1831.

The Superior Court charged the jury that the deed of 1760 was not sufficient to pass the estate of Jane the wife, and that the grantee and those claiming under him acquired nothing under it but the life estate of the husband. The court further charged that the deed of the sister of her share was not void by reason of adverse possession. Exception. Verdict for plaintiffs for one half of the premises.

The Supreme Court affirmed the judgment.

The Court of Errors however held, that by an *ancient usage* in the colony of New York, existing independent of any statute, a *feme covert* might, in conjunction with her husband, convey her interest in real estate by deed, without resorting to the common law mode of fine and recovery. 2. That, as the deed was given by husband and wife in 1760 to a purchaser in good faith and for a valuable consideration, the wife being then seized in fee in her own right, and it appearing that the purchaser was in possession at the time of the passage of the act of February 16, 1771, "to confirm certain ancient conveyances, &c.," the deed was valid and operative as against those claiming under the wife, though she had never acknowledged it in any form.

It was also held, that the deed which after describing the husband and wife as parties of the first part, stated that *he* by and with the voluntary consent of his wife, and for the consideration of the sum, &c., to *him* in hand paid, granted, &c., all the estate of *them* the said husband and wife, &c., and afterwards a clause by which "the said J. and *his said wife*, do grant, &c., peaceably and quietly, &c., to enjoy forever," although informal and inartificial, contained sufficient granting words to convey the fee simple of the estate, and at this late period, it ought not to be set aside for mere informality.

The court expressed no opinion as to the validity of the deed of the sister during an alleged adverse possession.

Judgment unanimously *reversed*, 21 for *reversal*.

DEVISE.

BARHEYDT v. BARHEYDT, 20 Wend. 576.

Not reported in Chancery.

Devise ; Fee Simple.

IN this case, the Chancellor held, that an estate devised to a grandson of the testator, without any words of limitation, to create a fee, gave only a life estate, and that devises to the sons of the testator of lands, with directions to the son to pay certain *legacies out of said estate*," gave only a life estate to the son and grandson.

The Court of Errors held, that the devise "of the upper half of a farm" to a son of the testator, and of the "lower part of the same farm to a son of such son" then living, without words of perpetuity in the devise to either, but with a *condition* annexed that the son shall pay certain legacies to his brothers and sisters, gives a fee by implication as well to the *grandson* as the *son*.

Chief Justice Nelson, who alone delivered an opinion in this case, announced the following conclusions. 1. That the legacies were a *personal* charge upon the testator's son John, inasmuch as the life estate might be insufficient, and he was to pay it out of the estate at all events ; and therefore must take the fee.

2. That he is made personally liable in respect to the *whole* of the farm devised—by the terms of the will—"said estate," referring to the whole.

3. That each devisee must take a *fee*, in order to enable the father to discharge the duty imposed upon him by other portions of the will, namely the payment of the legacies as they are charged upon *both* interests devised.

The decree of the Chancellor was accordingly *reversed* ; all the members of the court with one exception concurring in the opinion of the Chief Justice.

CUTTER v. DOUGHTY, 23 Wend. 513.

In S. Ct. 7 Wend. 305.

Devise ; Construction.

THE first clause of a will after giving the testator's wife a life estate in his farm, proceeded thus: "after her death I give to my *grand children* and to their heirs forever, my said farm, as follows, to wit, to the children of my *step daughter*, M., lot No. 1 ; to the children of my daughter S., lot No. 3;" and then providing for the children of three other daughters in the same way; the last clause was in these words: "It is my further will, that in case of the death of any of my said children, or my said step daughter, without lawful issue, the share or portion of my estate which by this my will would have gone to such issue, be equally divided among the *survivors* of my children or *grand children*, in the same proportion as herein before mentioned."

The Supreme Court held, that though in the devise of the property, the testator denominated the children of his step daughter his *grand children*, his naming them so in the clause devising the property, did not entitle them to claim, under the *last clause* of the will, a portion of the share of one of the daughters of the testator, on her dying without issue. But

The Court of Errors held, that the term "*grand children*" in *this clause*, embraced the children of his step daughter also, he having virtually declared such to be its meaning in the first clause.

Judgment reversed 13 to 11.

SPRAKER v. VAN ALSTYNE, 18 Wend. 200.

In S. Ct. 13 Wend. 592.

Devise ; Estate ; Legacy charged on Real Estate.

IN this case, the Supreme Court held as follows :

"A devise of lands, (before the R. Stat.,) where there are no words of perpetuity, gives only a *life estate*; and a fee .

will not be *implied* from a direction to the devisee to *pay the debts* of the testator, where such a direction is not made a *condition* to the devise, or declared a *personal charge* upon the devisee. A plaintiff in ejectment may recover a *less* estate than he claims in his declaration, and a verdict may be rendered in his favor for an *undivided part*, although in his declaration, he claims the whole of certain premises.

On a writ of error to the Court of Errors, the judgment was *reversed*, and that court held as follows:

Where a testator devised lands to two of his sons, *without words of perpetuity*, but directed them to *pay all his debts*; disposed of all his household goods and moveable effects to his wife, and created no estate in *remainder* as to the property devised to his sons; and where, from the tenor of the instrument, it was manifest that the testator *intended to dispose of his whole estate*. It was held that the charge upon the sons was *personal*, and that by necessary implication, they took a fee in the premises devised to them, although in other devises in the same will, words of perpetuity were used.

"It is manifestly the intention of the testator that the devisee shall pay debts or other charges, in respect to the lands devised to him, and not merely that he shall pay such debts or charges out of the *income or profits of the land devised*, the charge is *personal* upon the devisee, and he takes a fee by implication, although the devise be without words of perpetuity.

"Personal property, *specifically bequeathed*, and not as a mere residuum, is not the *primary fund* for the payment of debts, if by the same will, lands are given to the sons of the testator, *who are directed to pay his debts*; to exonerate the personal property in such a case, it is not necessary that there should be express words of exoneration."

21 for *reversal*, none for affirmance.

MOORE v. LYON, 25 Wend. 119.

Not reported in Court below.

Devise ; Estate.

EJECTMENT.

In a devise of real estate to "M. for life, and from and after her death to her three daughters by name, "or to the survivors or survivor of them, their heirs, &c., forever," &c. (See opinion of Nelson, Ch. J., 25 Wend. 120.)

The Supreme Court held, that the remainders to the children of M., were not *vested*, but *contingent*, as they went to the survivors ; and who this might be was uncertain.

Per Nelson, Ch. J. The counsel for the defendant concedes the case to the plaintiff, unless he can maintain that the clause of survivorship referred to the event of *the death of the testator*. Such conclusion would conflict with the plain intent of the will. The premises were given to M., for life, and after her decease to the three daughters, the survivor or survivors of them, clearly referring to the event of her death ;" and that court gave judgment accordingly. But

The Court of Errors held, (the President of the Senate, the Chancellor, and Senator Verplanck, delivering opinions in favor of *reversal*,) that the children's estate in remainder, was a *vested interest* at the *death of the testator*, and that therefore, though at the death of the tenant for life, but *one* of them be *surviving*, he takes only one third of the estate and the *heirs at law*, of the two others, (they being *surviving* at the death of the testator,) take the residue between them ; that the words of survivorship relate to the *death of the testator* and not to the *death of the tenant for life*, unless from *other* parts of the will it be manifest that the *intent* of the testator was otherwise.

Judgment reversed 13 to 3.

KIP v. VAN CORTLANDT and another. In C. E. 7 Hill 346.

In S. Ct. 1 Hill, 550.

Devise ; Codicil.

EJECTMENT.

The plaintiff in error was the tenant of P. G. Van Wyck, the residuary devisee of General Philip Van Cortlandt, and the defendants in error were two of his four heirs at law, and claimed the moiety of the premises, as a part of the real estate of General Philip, not disposed of by his will. P. G. Van Wyck claimed the whole under the residuary clause in the will. The original will was dated in 1824, when the testator and his brother and three sisters owned the premises as tenants in common in equal proportions. But subsequently, and before making the codicil, in January, 1831, he purchased and took a conveyance from his brother and sisters of their shares, and died seized of the whole in fee. By the original will he devised his interest in this lot to his brother and sisters, in lieu and satisfaction of certain claims they might have or had upon him in respect to his receipts from their common property. By the codicil, he recited this clause of his will, and stated that he had subsequently purchased most of the land; and that as he was chargeable with all the debts due from him to the estate of his father, this clause was useless, and he therefore directed such clause to be revoked and made void to all intents and purposes. (Case stated by Chancellor, p. 348.)

The Chancellor then says :

"The judgment of the court below was based upon the supposition, that the revocation of this clause of the will by the codicil, operated as a republication of the will, so as to give the residuary devisee *four fifths* of the lot which the testator had subsequently purchased; but that the striking of this clause out of the will, by the direction contained in the codicil to that effect, did not give to such residuary devisee the other fifth which the testator owned, when the original will was executed."

He says it is evident that this decision can not be right. The codicil, he holds, operates as a republication of the will,

and makes the will speak as from the date of the codicil, and that where a *specific devise* in the will was thus revoked by it, without making any other disposition of the property, it will in general pass under the residuary clause; and such was the decision of the court.

The Chancellor observes that "there is nothing in the decision of this court in the case of *Van Kleeck v. The Dutch Church of New York*, (20 Wend. 457,) upon the effect of republication by a codicil which contradicts the general rule that it makes the will speak as of the date of the codicil."

Judgment unanimously *reversed*, 18 for *reversal*.

DISCOVERY.

ARCHIBALD MCINTYRE and others, appellants, *v.* GEORGE W. MANCIUS and JAMES BROWN, respondents. On appeal, 16 J. R. 592-602.

In Ch. 3 J. C. R. 45.

Discovery to aid Defence in Suit at Law; What Necessary to State in Bill; Demurrer to Discovery.

THE appellants filed their bill of discovery, in July, 1817, against the respondents, stating in substance that they, without interest and for accommodation of Dow and Menzies, endorsed for them their note for \$4,000 in blank; that the note passed to the defendant Mancius, as his property; that they have a good and perfect defence to the note, and that the other defendant Brown, is a material witness for them, and had not when the suit was brought, and has not now any interest in the note. That the suit has been brought by Mancius under the blank endorsement, in the name of both defendants, B. and M., with full knowledge of the materiality of Brown's testimony, and with the sole view of depriving the plaintiffs (McIntyre and others) of his testimony. That there are facts exclusively in his knowledge, which can not be proved *aliunde*, and that Dow and Menzies are

insolvent. The defendants demurred to the bill of discovery, and stated as special causes of demurrer, that the plaintiffs have not set forth the nature of their defence at law, and do not show that the discovery sought is necessary or would be material.

The plaintiffs after the demurrer was put in, presented a *petition*, stating these facts, and that it was unsafe for them to proceed to trial at the circuit, without the discovery, and praying an injunction.

Kent, Chancellor, *denied* the injunction. "There is not sufficient set forth in the bill to entitle the plaintiffs to the aid prayed for. The nature of the defence at law ought to have been stated. For anything that appears on the bill, the discovery sought, may be utterly useless or frivolous, or it may be to enable the defendants at law, to convict the plaintiffs of a crime, or to subject them to a forfeiture. It is not improbable that the defence at law is usury, and then the assistance of this court would be obtained without a previous offer to do the present defendants justice, by paying the sum equitably due. The court ought not to compel a discovery when the object of it is kept concealed. On that single ground then, of a want of disclosure by the bill of the purpose for which the discovery sought is to be used, the motion for an injunction is denied." 3 J. C. R. 45-46.

The demurrer was afterwards brought to a hearing at the September term, 1818, of the Court of Chancery, when the Chancellor decreed that the appellants bill should be dismissed with costs.

From this decree an appeal was taken to this court, and after argument the decree of the Chancellor was *reversed*.

Spencer, Ch. J., delivered the only opinion. He says: "If this were a bill of discovery in the ordinary sense, I should entertain no doubt but that the demurrer was well founded. It is a bill to discover whether Brown, who is alleged to be a material witness for the appellants on the trial of the suit at law, has not been made a party collusively, without having any interest in the subject matter of the suit, and for the purpose of depriving the appellants of the benefit of his testimony. In this view, it is a case of the first impression and novelty, and it must be examined and

decided upon general principles, and analogies drawn from adjudged cases."

"As a general rule, a bill of discovery must state the matter in relation to which the discovery is sought, the interest of the party, with the right to require the discovery." He thus states the points.

"Does the bill in this case sufficiently state the appellants' case, the nature of the defence proposed to be aided by the discovery sought; and will the respondents be exposed to a criminal prosecution or penalty if they answer the interrogations of the bill affirmatively, and is the discovery material?"

"In the present case, no facts are required to be answered to, which would be evidence in the trial at law; for admitting that Mancius alone paid the consideration for the transfer of the note, and that Brown had no kind of interest in it, this would not defeat the suit at law. It might still be prosecuted in their joint names, and Brown be merely a trustee in part for Mancius. For all the purposes of the discovery sought, the bill is full and ample; the appellants seek to have Brown as a witness for them at law, on the ground that he has been wrongfully made a party, without any interest in the suit, and to deprive them of the benefit of his testimony, and in that view, as they ask for no *facts* to be used as evidence on the trial, it was, I apprehend, enough to allege generally, that they had a defence, of which the respondents sought to deprive them, by incapacitating their witness from testifying by the contrivance of making him a formal party on the record.

"It was urged that the discovery might be for the purpose of proving by the testimony of Brown, that the note was given for an usurious consideration; but no part of the bill leads to any such inquiry, and we are not at liberty, on vague conjecture, to presume any such defence. If Brown has been joined as a party to the suit at law, without any interest in the subject, and for the express purpose of depriving the appellants of his evidence, it would in my opinion form no objection to the discovery sought for, that Brown might prove the note usurious." As to this point he cites the case of the *Earl of Suffolk v. Green* and others, 1 Atk. 449,

where Lord Hardwicke said, "a man may, in many cases, bring a bill to *perpetuate testimony*, where he can not bring a bill for relief without waiving the penalty."

"If the facts turn out to be as alleged, that the respondents have made Brown a party, to prevent his being used as a witness, without his having any interest in the note, it is surely an attempt to pervert and evade justice; and our laws must be deplorably defective, if there be no remedy in such a case. I am fully satisfied there is a remedy, and that the Court of Chancery ought to have entertained the bill, and compelled an answer to it."

"It has indeed been insisted, that if the respondents answer and admit the facts stated in the bill, that then Brown can not be made a witness, so long as he remains a party to the record. I will not anticipate the opinion of the Supreme Court on that point, further than to say, that there must be some method of making Brown a witness, if he has no interest in the suit at law, except what he has acquired after the appellants became entitled to his testimony."

The court accordingly (Bowne, Senator, dissenting) pronounced judgment of *reversal*.

DIVORCE.

JOHNSON v. JOHNSON, 14 Wend. 637.

In Ch. 4 Paige, 462.

Divorce; Condonation; Evidence.

A BILL was filed in this case by the wife for a divorce *a vinculo matrimonii*, on the ground of the adultery of the husband. The adultery complained of in the bill, having been proved to have been *condoned* by the wife by *subsequent cohabitation with full knowledge of the offence*, the question arose whether the acts of *cruelty* by the husband to his wife after the condonation, could so *revive* the act of adultery condoned, as to entitle the wife to a divorce

a vincu'o on the ground of those former acts of adultery. Two other questions were made upon the evidence taken before the master. 1. As to the *admissibility* and *competency* of the evidence of a *physician* to prove that the husband who was his patient, was afflicted with a venereal disease at a period of some years after his marriage, and another question was made as to the effect of the evidence offered to show acts of gross levity, if not criminality on the part of the wife, which was offered before the master on taking proof of the acts of adultery of the husband, upon reference to him after the bill had been taken *pro confesso*. This evidence seems to have been offered to repel the effect of the acts of cruelty relied on, to revive the condoned adultery. Upon the report of the master, the Vice Chancellor of the first circuit granted a divorce *a vinculo*. On appeal to the Chancellor, he *reversed* the decree and ordered the bill to be dismissed.

The Chancellor says: "The testimony of the physician as to what he discovered and was informed of, when he was consulted by the defendant professionally, in 1830, was illegal and improper and ought not to have been received. By the 2d R. Stat. 406, a physician is not only *excused* but *prohibited* as a witness, from disclosing information which he acquired in attending a patient in a professional character. It is expressly stated, that the physician declined making any disclosure as to the disease the defendant was laboring under, until he was compelled by the master to answer. The master mistook the law on this subject, and the testimony being thus obtained in direct violation of this statutory provision, it should be rejected, or laid entirely out of consideration, in deciding whether the adultery charged in the complainant's bill is established by the proofs."

As to the condonation, the Chancellor says: "It is settled in the ecclesiastical courts of England, that condonation is but a conditional forgiveness, and that a repetition of the offence revives the condoned adultery. The same principle was recently recognized in this court, in the case of *Smith v. Smith*, 4 Paige, 434. The English courts, however, have gone still further, and have held that to revive a condoned adultery, it was not necessary that the new injury should be of the same nature, but that *cruelty, desertion, or other improper*

conduct of the husband toward his wife was sufficient for that purpose.

"Upon principle I am satisfied that it would be carrying the doctrine of revival, by subsequent misconduct of the offending party too far, to permit a suit to be instituted for a condoned adultery, unless it was founded upon a subsequent offence of the like character."

"There may be cases, however, in which this court would only have jurisdiction to decree a divorce for the original offence, which had been forgiven on the implied condition that it should not be again repeated. In such cases a subsequent offence, though committed out of the jurisdiction of the court, and while the parties were not residents of this state, might be sufficient to revive the condoned adultery so as to entitle the injured party to a divorce for such original offence. And where the *new offence* is of itself sufficient, if *duly* established, to sustain the suit, the complainant might also, as in France and Louisiana, make use of the fact of the former misconduct of the defendant in support or corroboration of the suit for the new offence." And the decree of the Vice Chancellor granting the divorce *a vinculo* was *reversed* accordingly.

On appeal from this decree of the Chancellor, the Court of Errors *reversed* the decision; but as will be seen from a note of the reporter appended to this case, by a vote which left, as the reporter contends, the question still unsettled, as to the effect of *cruelty* in reviving an adultery after a condonation by cohabitation with full knowledge of the offence.

In the Court of Errors, Savage, Ch. J., delivered the opinion in favor of *reversal*.

1. With regard to the *admissibility* and *competency* of the evidence of the physician before the master, he says: "No objection was made before the master by the *defendant* to the testimony of the physician. From his deposition, it appears that he had been informed that he was bound to testify, but it does not appear that the master decided that question." "Had the testimony of Dr. S. on this point been objected to by the defendant, he ought not to have been allowed to testify. The privilege is undoubtedly that of the party and not of the witness. It is like the case of an attorney in that

respect. 1 Ph. Ev. 108; 1 Stark 104. If the *party* waives his privilege, the witness may be examined."

2. With regard to the condonation, he observes: "The good sense of the implied condition which accompanies condonation, is that the offending husband shall not only abstain from adultery, but shall in future treat his wife with conjugal kindness. Hence, cruelty is a breach of the condition, and revives adultery, *Worely v. Worely*, 1 Haggard, 734." "If condonation is a part of our law, and the implied condition is as I have stated it, (and neither proposition is denied,) then it necessarily follows, that by a breach of that condition, both parties are placed in the same situation as before the condonation. The parties are in *statu quo*, remitted to their former rights and liabilities."

3. As to the charge of adultery attempted to be set up against the wife before the master with a view to repel the effect of the cruelty of the husband, Ch. J. Savage, after saying that no evidence sufficient to establish such a charge had been adduced, says: "If the wife had been guilty of adultery, that is a good bar, but evidence of such a fact, before the master, when the husband has suffered the bill to be taken *pro confesso*, is altogether improper; as much so as a set off would be in an action at law, upon the execution of a writ of inquiry.

"I am of opinion therefore that the adultery (of the husband) was sufficiently proved; that the condonation was conditional; that the condition having been broken by both cruelty and lascivious conduct, subsequent to cohabitation, the previous cause of action founded on the husband's adultery was revived; and consequently that the complainant was entitled to a divorce."

No other opinion was delivered in favor of *reversal*; but Senator Tracy delivered a brief one in favor of affirmance.

Decree of Chancellor *reversed* 11 to 9.

The note by the reporter to the above case 14 Wend. 648, is as follows:

When the court came to settle the decree in this case, Senator Kemble, who had voted for *reversal*, stated that he had done so for the reason that he was not satisfied that a *condonation* had been established by the proofs taken

in the cause, and that consequently the complainant was entitled to a divorce on the ground of the *adultery* committed by the husband. Having come to this conclusion, he had not examined the question whether under the revised statutes of this state a right of action for the cause of adultery can be *revived* after condonation, by any subsequent misconduct of the husband, other than of the character of the original offence.

The result of this exposition of the views of Senator Kemble, is that the principal question passed upon in this case, must be considered as left open and undecided; the opinion pronounced by the Vice Chancellor, (McCoun,) having the support of the opinion of Chief Justice Savage, concurred in by Mr. Justice Nelson, and nine senators, and the opinion delivered by the Chancellor, having the support of the opinion of Senator Tracy, concurred in by eight senators."

The names respectively are as follows:—

For *reversal*, Chief Justice Savage, Mr. Justice Nelson, and Senators Armstrong, Beckwith, Bishop, Cropsey, Griffin, Kemble, Lacey, McDonald, and Willis.

For *affirmance*, Senators Downing, Edmonds, Edwards, Fisk, Lansing, Mack, Maison, Tracy, and Van Schaick.

✍ We believe the profession generally consider the question very well *settled* by the opinion of Ch. J. Savage.

DOWER—ALIEN WIDOW.

PRIEST *v.* CUMMINGS, 20 Wend. 338.

In S. Ct. 16 id. 619.

Dower ; Alien Widow.

SUIT by Catherine Cummings, widow of James Cummings, to recover her dower in certain lots in the city of New York, conveyed to her husband in 1796, and by him mortgaged to James Foster in June, 1802. The plaintiff intermarried with her husband in January, 1802, he being a native citizen of the United States, and she an alien and a minor of about 19 years of age. The mortgage was foreclosed, and the prem-

ises sold to one R. in June, 1804, under a decree of foreclosure to which the plaintiff was not made a party. The wife though an alien and a minor, had joined in the execution of the mortgage. In October, 1829, she was naturalized and her husband died in 1832. The purchaser or those deriving title from him had been in possession of the premises from the time of the sale.

The Supreme Court, chiefly upon the authority of the case of *Sutliff v. Forgey*, 1 Cow. 89, and 5 id. 715 in error, held that the widow was entitled to dower.

The Court of Errors held otherwise, and decided. 1. That the widow of a native born citizen, she having been an alien at the passage of the act of 1802, "*enabling aliens to hold and purchase real estate*," is not entitled to dower under the provisions of that act, where the land in which dower is claimed was acquired by the husband and the marriage took place, before that act was passed. 2. That the naturalization of the widow during her coverture, though good, had no retro-active operation under the act of Congress, so as to entitle her to dower in lands of which her husband had been seised during coverture, but had aliened before her naturalization.

Judgment of Supreme Court *reversed*, 12 to 8.

EQUITABLE ASSIGNMENT.

HOSACK and BLUNT, executors, &c. v. ROGERS, &c., executors, 18 Wend. 415.

Equitable Assignment.

THE principal point decided by the Chancellor, and the only one overruled by the Court of Errors, on appeal in this case, was as follows :

A firm consisting of three persons became insolvent, and made an assignment of the co-partnership property for the

payment of its creditors, and the senior partner covenanted that he would pay to such of the creditors as should release the two junior partners, the full amount of their debts, (if the assigned property was not sufficient,) out of the proceeds of his claims upon the French government, when the same should be received. The senior partner afterward died, leaving as his executor R., one of the creditors of the firm who had become a party to the assignment, and who afterward recovered a part of the claims of the senior partner upon the French government. The Chancellor held, that the covenant was in equity a *specific appropriation* of the fund for the payment of the balance due to the creditors, who executed the release to the two junior partners, which entitled them to a preference in payment out of that fund, as against the general creditors of the senior partner; and that the executor could therefore only have his *rateable proportion* of the fund with the others who also executed the release, but could not retain for his whole debt. But

The Court of Errors held: 1. That the *covenant* to pay by the senior partner, could not be construed into an *equitable assignment or mortgage* of the fund, so as to give the creditors a specific lien thereon; such covenant is merely personal. 2. That the moneys obtained from the French government under the treaty, in satisfaction for property of the testator, illegally captured on the high seas, are, in the hands of an executor, *legal*, and not merely *equitable* assets. And the executor being his creditor previous to the revised statutes, had a right, as against creditors of the same class, to retain the amount due to him. And 3. The *statute of limitations* could not be interposed in bar of the exercise of such right of retainer."

The residue of the decree of the Chancellor was *affirmed*,

ESCAPE.

JANSEN *v.* HILTON, 10 J. R. 549.

Not reported in S. Ct.

Voluntary Return.

ACTION against sheriff for an escape.

The Court of Errors held that in an action against the sheriff for an escape of a prisoner from the *liberties* of the jail, the sheriff may avail himself of any defence to the action which he might have had at common law in an action for an escape from actual custody.

Judgment *reversed* accordingly.

MANDELL *v.* BARRY, 10 J. R. 563.

In S. Ct. 9 J. R. 234.

Escape ; Recapture or Voluntary Return ; Sureties.

ACTION for an escape against *sureties* for the liberties of the jail.

The Supreme Court held, that a voluntary return of a prisoner, before suit brought, to the custody of the sheriff, was not a good defence to an action for the escape brought by the assignee of the bond to the sheriff, for the liberties of the prison against the prisoner and his sureties. The Supreme Court held the return not a good defence by the sureties, although it was so for the sheriff.

The Court of Errors held that it was a good defence for the *sureties*, as well as the sheriff, in an action for an escape and *reversed* the judgment of the Supreme Court.

RICHMOND v. TALLMADGE, 16 J. R. 309.

In S. Ct. 10 J. R. 85.

Escape ; Voluntary Return ; Special Verdict.

IN an action for an escape against the sheriff, the jury found that the prisoner had voluntarily returned before suit, but that the sheriff had not verified his plea with an affidavit that the escape was without his knowledge or consent, (as the statute required,) and the Supreme Court held that the defence was not complete without it, and that the sheriff was liable for the escape. But

The Court of Errors held that the finding of the jury as to the want of an affidavit, might be rejected as surplusage *being matter not in issue*, and that if a plaintiff go to trial on such a plea, instead of treating it as a nullity, or moving the court to set it aside, or if notice be given of it, moving to strike out the notice, he can not take advantage of it at the trial.

Judgment of Supreme Court *reversed*.

EVIDENCE.

LIVINGSTON v. ROGERS, 1 C. C. E. xxviii. 2 J. C. 488.*Parol Evidence of Lost Instrument.*

IN this case the Supreme Court held, adhering to the ancient common law rule of evidence, that the mere *loss* of an instrument by the *agent* of a party, without *destruction proved*, did not authorize the admission of parol evidence of the contents; (the agent was called to prove the *loss* and *contents* of a power of attorney to himself.)

The Court of Errors however, *reversed* the judgment of the Supreme Court, and held that parol evidence of the con-

tents might be adduced, if the person to whom it was given, prove it to have been lost, and that he might give parol evidence of the contents.

Judgment of *reversal*.

SLEIGHT *v.* RHINELANDER. In S. Ct. 1 J. R. 192.

In Ct. of E. 2 J. R. 534.

Evidence ; What may be Proved by Parol.

ASSUMPSIT on policy of insurance.

In this case the Supreme Court held, that parol evidence was inadmissible to prove what was commonly understood by a term to which it was held that the law had affixed a precise and definite meaning. The term in this case was "sea-letter," as used in a policy of insurance.

The Court of Errors *reversed* the judgment of the Supreme Court, and held that parol evidence was properly admissible to show that the particular paper offered in evidence in the case was also commonly understood to be a sea-letter.

JACKSON *v.* VAN ALLEN, 8 J. R. 495.

In S. Ct. 5 J. R. 440.

Evidence as to Construction of Patent.

THE Court of Errors in this case *reversed* the decision of the Supreme Court, upon the question of the admissibility of certain evidence *as to the sense of the parties* in regard to the legal effect of a patent of lands, which that court held inadmissible.

The Court of Errors held, that although the *construction* of a grant is matter of law, yet its *legal effect*, (deducible from the terms used in it, or from matter subsequent which, as showing the *sense of the parties*, may authorize a larger or narrower construction so as to include or exclude particular premises,) is a matter of fact for a jury only to decide.

MANHATTAN COMPANY v. OSGOOD and others, 3 Cow. 612.
In S. Ct. 15 J. R. 162.

Evidence; Fraudulent Conveyance; Judgment against Executors.

THE Supreme Court held in this case, that the conveyance, merely voluntary, by a grantor who was at the time insolvent, was *void*, as respects creditors, and the land conveyed, *assets* in the hands of the *heirs* or *devisees* of the *residuum* of the estate; that, in an action by the creditor against the *heirs* or *devisees*, where some of them were, also, the executors of the grantor, and had, as executors, petitioned the surrogate for leave to sell the real estate of the grantor, on account of an alleged deficiency of personal assets; their petition was good evidence against *all the defendants to show the insolvency* of the grantor, so as to avoid the conveyance and repel their plea of *riens per descent*.

The Court of Errors held, 1. That the acts or admission of the *executors* were not evidence against *heirs* or *devisees*. 2. That a judgment against the *executors*, is not evidence against the *heirs*; but that to make the *confessions* of one man evidence against another, they must have a *joint interest in possession*, and that the confession of a grantor or of his executors, *after* the grants, are not admissible in evidence to prejudice the rights of the grantee.

Judgment reversed.

See *Wood v. Genet, &c., post*, which grew out of this decision.

WOOD v. JACKSON *ex dem.* GENET and others, 8 Wend. 9-47.

In S. Ct. 3 Wend. 27, and see opinion of Savage, Ch. J., on motion for new trial after *second verdict* for plaintiff, 8 Wend. 13 *et seq.*

Ejectment Estoppel; Reversal of Judgment.

EJECTMENT for certain premises in the city of New York. The plaintiffs claimed as heirs at law, and grantees of Mrs.

Osgood, who conveyed the property to her daughter Martha Osgood, who afterwards intermarried with Edmund C. Genet, one of the lessors of the plaintiffs and died leaving issue who joined in the demise. The defendant claimed title under a sheriff's deed given to a purchaser, at the sale of the property under judgment against the heirs and devisees of Mrs. Osgood, for a debt due by him in her lifetime to the Manhattan Bank. (See *Osgood v. Manhattan Company*, 15 J. R. 167, *ante*, where the judgment under which the sale took place was reversed, but several years after the sale of the premises.)

On the trial of the cause, the defendant offered as *evidence* to prove the fact that the validity of the deed of Mrs. Osgood to Martha Osgood, then Mrs. G., had been passed upon by the jury on the trial of the case of the *Manhattan Company v. Osgood*, the record of the verdict and judgment in that case, but they were not set up by *plea* as an estoppel. The verdict and judgment thus offered were rendered against the lessor of the plaintiff, Genet and his wife and others, in a suit against them as heirs and devisees of Mrs. Osgood, in ~~which suit~~ they pleaded *riens per descent*, and on the trial ~~of that issue~~, the jury found a verdict against the lessor of the plaintiff and others, defendants in that suit, and which judgment was subsequently reversed by the Court of Errors.

The Circuit Judge (Edwards) admitted the record of this judgment to be given in evidence, and also admitted parol evidence to be given by the defendant Wood, to prove that the validity of the deed of Mrs. O. to Martha her daughter, was in issue and passed upon by the jury in that cause, and that they *must* have found the issue on the validity of *that deed*, to wit, that the wife of the lessor of the plaintiff, E. C. Genet, who were both defendants in that suit, took the premises by *descent*, as a verdict was found against them on the issue of *riens per descent* and that the property was therefore assets in their hands to pay the debts of Mrs. Osgood. The Circuit Judge then charged the jury, that if they found that the issue in the record offered in evidence embraced the premises in question in the present suit, then that record and the finding of the jury were *conclusive* against the lessors of the plaintiffs, in favor of a purchaser under it, while it was in force; al-

though the judgment was afterward *reversed*. Verdict for the defendant.

On bill of exceptions and motion for a new trial,

The Supreme Court held, that "the verdict and judgment in that suit, not having been pleaded as an estoppel and so produced, but merely given in *evidence*, were no bar to the plaintiff's action of ejectment; it not appearing by *the record* that the fact sought to be established by it, was in issue and passed upon in that suit; that they were not conclusive, even if they were so passed upon; for the record being *mere evidence*, the jury may find against it, if the other evidence in the case will warrant their so doing. To make a record *conclusive*, it must appear on its face, that the same matter was in issue, and parol evidence can not be admitted to prove that fact. It must appear that the question was *directly* and not *collaterally* put in issue; the finding must appear affirmatively and expressly, and not rest in inference." The court accordingly granted a new trial, at which the Circuit Judge ruled, after the defendant had offered the same record of the judgment and execution under which he claimed *in evidence*, that under the decision of the Supreme Court granting the new trial, the evidence given at the former trial testifies to the same question was in issue in the former trial, and passed upon by the jury, was inadmissible. He also charged the jury that the receipt given by Genet, of the surplus of the avails of the sale of the premises, formed no bar to the plaintiff's right of recovery. Exceptions to the decision of the judge as to rejection of testimony and to the charge. Verdict for plaintiff, and motion for new trial. On this second motion for a new trial,

The Supreme Court held, that the rejection of the testimony offered, and the charge of the judge were correct. Ch. J. Savage, who delivered the opinion of the court, (see 8 Wend. 16-27,) saying that "if the judge erred in excluding the testimony, it was not his error but that of the Supreme Court, in its former decision, on which that of the Circuit Judge had been based." He also observed that if the judgment is reversed, &c., the purchaser has a remedy for his purchase money; evidently meaning that if the *purchaser* is *evicted*, he may still resort to the judgment creditor for his purchase

money, *i. e.*, that Wood would have a right to recover back the money paid by him, from the Manhattan Company. From this judgment, the defendant Wood brought error, and now

The Court of Errors held that the judgment of the Supreme Court must be *reversed*. Chancellor Walworth, who delivered an opinion in favor of reversing, puts the reversal upon grounds which it is to be presumed, were those of a majority of the court, although the other member of the court who delivered an opinion for reversal, rests his decision on different reasons, which will be presently noticed. The Chancellor says :

"We see from the record, that the only question to be tried in the case between the *Manhattan Company* and the children of *Mrs. Osgood*, was whether *any* and not *what* lands had come to them by descent or devise. It appears by the report of that case, 3 Cow. 611, that the testatrix was seised of *other real estate* besides that conveyed to her daughters. The deed to Mrs. Genet was made valid by her subsequent marriage, (in the lifetime of her mother.) A verdict can not be urged as an estoppel to the litigation of a fact which was not *absolutely necessary* to the finding of the verdict in the previous case. *The King v. Inhabitants of K.*, (4 Dow. and Ry. 469.)

"It also appeared on the former trial of this cause, that the judgment had been reversed in the Court for the Correction of Errors, and the verdict set aside. This was of itself a sufficient answer to the verdict when urged by way of estoppel, 4 H. and Mc Henry, 246 ; 1 Har. and Johns. 253. In this case the judgment no longer operated upon the land ; the moment it was reversed and the verdict set aside, the *estoppel* was gone.

"But notwithstanding the reversal of the judgment, the purchaser is entitled to the land purchased under it, while it was in existence ; but he is not entitled to the benefit of a *collateral fact*, settled by a verdict afterwards set aside for illegality. I am therefore of opinion that the decision of the Supreme Court in this case, by which they set aside the first verdict, and granted a new trial, was correct.

"But the counsel for the defendant, who were undoubted-

ly aware of these difficulties, have at this last trial carefully excluded the fact, that the judgment had been reversed. They also offered to prove that the *only question* before the jury on the trial of the cause of the *Manhattan Company v. Osgood and others*, was as to the validity of the deed to Mrs. Genet. 'The Supreme Court passed upon the case under the supposition that it embraced the same questions which they had previously decided in favor of the lessors of the plaintiff. Although I agree with the opinion of Mr. Justice Marcy, that on the facts as presented to the court on the first trial, there was no *estoppel*, yet from the shape in which the counsel who tried this cause have suffered it to come before this court, I do not see how we can avoid reversing the judgment, and sending it back for a new trial. We can only take judicial notice of the facts stated in this bill of exceptions, although we may be satisfied the facts will be otherwise when the case is retried. I must therefore vote for a *reversal* of the judgment, and that a *venire de novo* be awarded." p. 36-7.

✎ Senator Seward, who delivered the only other opinion, maintained that the record accompanied by the proof that the jury passed upon the question, was *conclusive*. But he does not handle or even touch the question as to the effect of the reversal of the judgment, which the Chancellor holds, (and we must take leave to think, correctly) is a sufficient answer to the verdict, when urged by way of *estoppel*.

Judgment unanimously *reversed*, and *venire de novo* awarded; on which the plaintiff had a verdict and judgment in his favor.

KIMBALL and ROWE v. BROWN and DAVIS, 25 Wend. 259,
In S. Ct. 19 Wend. 437.

Evidence; Subscribing Witness.

THE only point in this case upon which the Supreme Court was adjudged by the Court of Errors to have *erred*, was with regard to the sufficiency of the *proof of the hand-*

writing of the subscribing witnesses to a deed of land for which this action was brought.

The Supreme Court held, that proof of the handwriting of the subscribing witnesses to a deed, is sufficient evidence of its execution, although the witnesses be dead, and the party seeking to establish the deed is not bound, in addition to such testimony to give evidence of the handwriting of the grantor, or of other facts to show his identity.

The Court of Errors held, that the proof of the handwriting of deceased subscribing witnesses to a deed, is not sufficient evidence of its execution to *entitle it to be read to the jury*, where the *deed on its face excites suspicion of fraud*. The party producing it must in such case, give evidence explaining the suspicious circumstances, or proving the identity of the grantor; and *reversed* the judgment of the Supreme Court, by a vote of 11 to 9.

The *suspicious circumstance* in this case, was that in a printed deed describing the grantor as of the commonwealth of Massachusetts, and dated in January, 1770, (conveying the land in question,) in the word *seventy*, the last *syllable*, "*ty*," was like the words "commonwealth of Massachusetts," &c., *printed*, but the two first "*sev-en*," were written on an *erasure*. A clerk of the register of deeds of the county of Essex, Massachusetts, in which courts *Gloucester* also was, testified that he had examined the records of the office at Salem, in said county, from 1765 to 1780, and that the word "commonwealth," did not occur in such records, until he found it in a deed dated May 10, 1780. That in all the rest it was called "the *province* of Massachusetts Bay," or the "*state* of Massachusetts." This the Court of Errors held sufficient to put the plaintiff upon the explanatory proof indicated by the decision, before *the deed could be read to the jury*.

☞ In *Northrop v. Wright*, 7 Hill, 476, in error, Chancellor Walworth denies the foregoing case of *Kimball v. Brown* to be law, except in cases *precisely similar*.

MILLER v. MANICE, 6 Hill, 114.

Not reported in S. Ct.

Evidence ; Estoppel ; Record of Former Suit.

THE plaintiffs in error brought an action of trover for three promissory notes, drawn by them and made payable to the order of Manice, Phelps, and Co., of whom Manice the defendant was one. The declaration also contained counts, alleging that the notes were procured by fraud and false pretences, and that the plaintiffs had been obliged to pay them. Plea, general issue.

On the trial of the cause, the plaintiffs proved substantially that Phelps, one of the firm, had obtained the three notes from them by representing that he could procure a loan for them at 6 per cent. on their notes ; but instead of procuring the loan he delivered the notes to one Bullock, in payment of a loan he had previously made to Phelps, on the checks of his firm. The plaintiffs claimed that the notes were obtained and used for the joint benefit of Phelps and Manice, and that the latter had actually participated in the fraud.

On the defence, Manice offered in evidence the record of a former recovery in an action brought by the plaintiffs against himself, Phelps and Foote, as partners, claiming that it formed a bar to this suit. This was objected to by the plaintiffs, as inadmissible under the general issue, but the objection was overruled, and the decision excepted to. That suit was an action of assumpsit, for money paid, &c., against the three for the amount of the notes paid by the plaintiffs, but Manice only was served with process, and alone appeared and defended. At the trial of that cause, the plaintiffs sought to recover for the amount paid by them on the three notes for which trover was now brought, as well as for another note which they had taken up. The Superior Court charged the jury that if they believed the three notes then in question, were endorsed by Phelps, in the name of his firm, to be negotiated for the benefit of the plaintiffs, and that neither the notes nor the proceeds came to the benefit of the defendants Foote and Manice, and that Manice and Foote had no agency in any fraudulent representations to the plaintiffs, the

defendants were not liable. The verdict was in favor of Miller and Co. for the amount of the *one* note not in suit here but disallowed the claim as to those three notes, for which this suit is brought.

The Circuit Judge charged the jury that the effect of the record of the prior judgment was a question of law, and that in law it was a complete bar to a recovery in this suit. Verdict for Manice, and motion for a new trial on the bill of exceptions denied by the Supreme Court.

The Court of Errors, however, reversed their decision, and held that the record was not a *conclusive bar* when offered in evidence under the general issue, though admissible under it.

Chancellor Walworth, who delivered an opinion in favor of *reversal*, says: p. 125,

"The general rule however, unquestionably is that where the party in whose favor the former verdict and judgment were rendered, wishes to rely on them as a conclusive bar, or an estoppel, he must plead them in bar, if he has an opportunity to do so. And if he neglects to plead, and puts the same matter again in issue to be tried, the jury may decide such issue according to the right and justice of the case as it appears to them from the evidence, notwithstanding the verdict and judgment in the former suit. The judge therefore who tried this cause was wrong, in holding that the record of the verdict and judgment formed an absolute bar where the defendant might have pleaded it as an estoppel, if the former suit was for the same matter.

"For these reasons," he says, "the law as well as the justice of the case is with the plaintiff in error, and the judgment of the court below should be reversed."

Putnam, senator, delivered an opinion in favor of *affirmance*, reviewing the cases on the subject.

Judgment of Supreme Court *reversed*, 14 to 5.

ROCKFELLER v. DONELLY, 8 Cow. 727.

In S. Ct. 4 Cow. 253.

Evidence against Sureties in Bastardy Bond ; Damages.

THE Supreme Court held in this case, that an action on a bond given by a putative father and his sureties to the overseers of the poor, to indemnify the town against the maintenance of a bastard child, will not lie unless the overseers show that they have been damnified by an *actual payment of money* or other disbursement in support of the child, and that a *mere liability to maintain the child* is not sufficient.

2. That an *order of filiation* against the putative father charging him with a weekly payment of money, or payment of money for past expenses, &c., is not admissible evidence in support of such an action.

The Court of Errors (Jones, Chancellor, delivering an elaborate opinion,) *reversed* the judgment of the Supreme Court, and held,

1. That a bond to *indemnify* a town concerning a bastard child, given pursuant to the statute, (1 R. L. 306,) is broken, and an action may be maintained upon it as soon as the town becomes *liable or bound to maintain the child*.

2. That the action may be maintained upon it without *actual disbursement, advance or payment* by the town ; and

3. That the order of filiation and maintenance, made in pursuance of the first section of the act, against the putative father, is *per se, conclusive evidence* to sustain the action, even against the sureties, and may be used to fix the *amount of damages*.

Judgment reversed.

DUFFY v. THE PEOPLE, 6 Hill, 75.

In S. Ct. 1 Hill, 335.

Evidence: Sureties on Conviction by Magistrate of Husband for abandoning Wife.

THIS was an action of debt upon a recognizance entered into by the defendant Duffy, as surety for one Daly, who was summarily convicted before a magistrate, under the statute relative to disorderly persons, of abandoning his wife without support. The condition of the recognizance was for the support of his wife in future. The breach alleged was that he had not supported his wife, &c. The fifth plea set up that the conviction of Daly was by the justice alone, without a jury, and that this proceeding under the statute was therefore contrary to the 7th act of the constitution of this state, and that the recognizance was obtained by duress of imprisonment, &c. To this there was a demurrer, which the Supreme Court sustained, holding the statute to be constitutional. On the trial in the court below, the defendant Duffy offered to prove that the woman alleged to be the wife of Daly was not in fact married to him, and that the relation of husband and wife did not exist, which evidence the court overruled. The Supreme Court held this decision of the Common Pleas also correct. But

The Court of Errors held, that in an action on such a recognizance, the sureties may defeat a recovery by pleading and proving, notwithstanding the conviction of the principal, that the woman alleged to have been abandoned or left unprovided for by him, was not *in fact his wife*.

The Chancellor who delivered the opinion of the court, held also that the statute in question was constitutional, although it authorized a conviction by a magistrate without the intervention of a jury.

He also held that where the issue was upon the question of husband and wife, the conviction is not even *prima facie* evidence against the sureties.

Judgment *reversed*, all the members of the court but *two* voting for *reversal*.

FORREST v. KISSAM, 7 Hill.

Reported 25 Wend. 651.

Witness ; Evidence.

ON the trial of this cause before referees, after the direct examination of a witness called by the defendant was closed, they adjourned the further hearing of the cause to a future day, for their own accommodation, but with the consent of both parties; the plaintiff saying nothing at that time as to his intention to cross-examine, and before the arrival of the adjourned day, the witness died. The referees considering the examination of the witness incomplete, rejected the evidence on the direct examination, and the Supreme Court held their decision correct in that particular. But

The Court of Errors held, that the referees had no right under those circumstances to reject it as incompetent, but were bound to consider it in making their report.

"Otherwise," observes the Chancellor in his opinion in favor of reversal, "if the opportunity to cross-examine had been lost by the misconduct of the witness, or by the fault or negligence of the party calling him."

It was also held, that the declarations of a witness can not be resorted to for the purpose of disqualifying him on the ground of *interest*, though otherwise as to the declarations of the party calling him.

Judgment *reversed*, 10 to 6.

BAILEY v. WAKEMAN, 2 Denio, 220.

In S. Ct. 2 Hill, 279.

Evidence ; Partner.

ASSUMPSIT by Wakeman and others, plaintiffs below, against Bailey for goods sold and delivered, &c. The facts were, as far as material, as follows: Vaill, one of the partners of the plaintiff below, in his life time, being in the country, purchased from the defendant Bailey, a sight draft on New York, which Bailey endorsed to the firm. Vaill then immediately

remitted it to his partners in a letter, in which he directed them to credit the draft to himself individually; after which the defendant became a buyer of goods from the firm to an amount exceeding that of the draft. The surviving partners of Vaill, who died before the suit was brought, refused to give Bailey credit for the draft, which he sought to set off against their demand. To repel the set off, they offered in evidence Vaill's letter to them enclosing the draft, in which he directs it to be credited to his individual account. The judge at the trial admitted the evidence, and the jury having found against the set off, a bill of exceptions was taken, and on a motion for a new trial,

The Supreme Court held the evidence *admissible*, and denied the motion, holding the letter admissible as a part of the *res gesta*, to show that the purchase was an individual transaction of Vaill, the deceased partner. But on writ of error from this judgment,

The Court of Errors held that the letter of the partner who purchased the draft was not competent evidence for the plaintiffs as a part of the *res gesta* to prove the purchase an individual transaction of Vaill, nor for any purpose whatever as evidence in their favor; and the judgment of the Supreme Court was *reversed* by a vote of 24 to 1.

EVICITION.

TYMASON *v.* BATES, 14 Wend. 671.

In S. Ct. 13 id. 303.

Eviction; Covenant of Seisin.

IN this case, the action was for a breach of the *covenant of seisin*, and the Supreme Court held, 1. that the plaintiff is entitled to recover, if he shows an *eviction* by due process of law, from any portion of the premises embraced within the *courses and distances actually run*, and the *monuments actually* established in a survey made previous to the execu-

tion of the deed, in reference to the premises conveyed; although the land from which the plaintiff is evicted, is not comprised within the bounds of the tract of which in the deed it is alleged to be part or parcel.

2. That *parol evidence* of the *acts* and *declarations* of the covenantor is admissible to show the *courses and distances actually run* in such previous survey, for the purpose of proving that the land from which the plaintiff is evicted, is embraced within the description of the premises, as set forth in the deed. But, on review,

The Court of Errors held, 1. That an action of covenant for breach of the covenants of seisin and quiet enjoyment, will not lie for the *eviction* of the grantee from lands taken possession of by him under his deed, where the premises are described as a *specific lot in a certain tract or patent*, and the lands of which the grantee is evicted are not embraced in such description thus referred to by the deed.

2. That *parol evidence* is inadmissible to show that the lands are comprised within certain limits *designated by the grantor* in the *negotiation previous to the conveyance*, as the boundaries of the lot in question, where that part of the premises from which the plaintiff is evicted, are not in fact embraced in the *description* of the premises contained in the deed as "*a specific lot in a certain tract or patent.*"

Judgment reversed accordingly.

¶ Quere? whether even *written evidence* of such designation of the limits by the grantor, such as his letters, &c., *previous to the conveyance*, would be admissible evidence, in such an action of covenant, under such circumstances? and whether, if such designation were the *mistake or fraud* of the grantor, the remedy of the grantee would not be in *equity*, or an *action on the case*? If so, it would seem to follow that a *subsequent grantee* of the first grantee, could have *no* remedy against the grantor, either at law or in equity, upon such eviction, as such a cause of action could not run with the land, by virtue of the covenants of seisin and quiet enjoyment, *the premises evicted of, not being in fact conveyed by the deed.*

EXECUTORS AND ADMINISTRATORS.

MURRAY v. BLATCHFORD, 1 Wend. 583.

Not reported in Chancery.

Executors and Administrators ; Release ; Compromise by Two without Assent of Third Executor.

BILL by next of kin against the administrators of their intestate, and one of the debtors to his estate, who had compromised his debt with two of the administrators, without the concurrence of the third, to have the release set aside and for a payment of the residue of the debt.

The Chancellor made a decree to that effect, holding the release not binding on account of the dissent of the third administrator, one third also of those entitled to distribution, having opposed the release.

The Court of Errors held, that the release by the two without the concurrence of the third administrator, was good, and that his dissent was no objection to its validity ; that executors and administrators stand on the same ground ; their liabilities and responsibilities, and their rights and interests are the same.

The Court of Errors assented to the principle of the Chancellor's decree, as to the right of persons interested in an estate to pursue property into the hands of any person who *colludes* or *conspires* with the executors to produce a *devastavit*. *Collusion* is any intermeddling with the executor or the assets of the testator, by which the executor is guilty of a violation of his duty.

But it was held by the Court of Errors, that though the release was executed by the two administrators, contrary to the known wishes of one third of those entitled to distribution, it was not liable to be set aside where there was no *fraud* or *collusion* shown between the debtor and the administrators ; and as the *answer denied all fraud and collu-*

sion, and no evidence had been taken to establish either, that fraud or collusion could not be alleged to avoid the release.

Judgment *reversed* accordingly.

BOGART, appellant, v. HERTELL and others, respondents, 4 Hill, 492.

Reported below, 9 Paige, 52; and 3 Edw. Ch. R. 20.

Executor; Sale of Bond and Mortgage and Misapplication of Proceeds.

• APPEAL from Chancery by defendants below.

D. by his will gave the rents and profits of two thirds of his real estate to his daughters for life, the fee to their issue; and the fee of the other third to his grandsons, to take at 21, with the benefit of the income during their minority by way of maintenance. The will then proceeds as follows: "For the more equal and easy division of my estate, I do hereby fully authorize and empower my executors hereinafter named, whenever they shall think it expedient, to sell and dispose of all or any part of my real estate for the most moneys that can be gotten for the same, &c." In pursuance of this authority, the two acting executors sold certain lots of land, parcel of D.'s estate, and took a bond and mortgage in their joint names as executors, for a portion of the purchase money. Afterwards, and prior to the fund being wanted for distribution, one of the executors sold and assigned the bond and mortgage to B., and after misapplying the proceeds, failed.

The Chancellor held, that the sale and assignment by *one* executor alone was unauthorized, and that the assignee acquired no title under the assignment; and that he was only entitled to be protected in equity, so far as the purchase money paid by him was actually applied to the purposes of the trust; or was afterward recovered out of the securities which had been taken for a portion of the purchase money by the executor and trustee who had been guilty of the waste; the Chancellor holding that though at law one executor might dispose of the goods or securities of *the testator*

to a *bona fide* purchaser; yet, that when a note or other security is given to two or more executors *jointly after the death of the testator*, the legal title is in them all; and the concurrence of all is necessary to transfer the legal title to such note or security, to a purchaser.

The Court of Errors held, that though the other executor did not concur in the assignment, B. the assignee, acquired a valid title to the bond and mortgage, having purchased in good faith; Nelson, Ch. J., and Bockee, senator, denying the Chancellor's distinction between notes and securities given to *executors as such after the death* of their testator, and those left by him, given to him *in his lifetime*, provided the money when received would be *personal assets*, which they maintain the bond and mortgage to have been in equity, as a sale of the real estate was authorized by the will.

Judgment of *reversal*, 16 to 2.

FOREIGN ASSIGNEE OF BANKRUPT.

ABRAHAM and THOMPSON *v.* PLESTORO, JOHNSTON, and others, 3 Wend. 538, 573.

In Ch. 4 Paige, 236.

Foreign Assignee of Bankrupt.

ABRAHAM, the defendant below, left England in July, 1828, with 24 cases of paintings, merchandize, &c., and on arriving at New York, the goods were deposited in the public store, under charge of the defendant Thompson, as collector of the port. Shortly after Abraham left England, a commission of bankruptcy was sued out against him, and he was duly declared a bankrupt. On the 8th of August, 1828, Johnston, one of the complainants, was made provisional assignee. On the 24th of September, 1828, he, together with the creditors of Abraham, all of whom were British subjects, resident in England, filed their bill in this cause, before

judgments obtained by the creditors, and obtained an injunction restraining the collector from delivering the goods to Abraham, and restraining the latter from receiving or prosecuting for the same. Abraham put in his answer, neither admitting nor denying the proceedings under the commission, but alleging that he had left England in the lawful pursuit of his business, and with a *bona fide* intention of returning; and denying that he was insolvent, or had committed any act of bankruptcy in England. He admitted the debt of Plestoro, and some others as stated, but denied others in the bill. On the coming in of the answer, the defendant, Abraham, moved for a dissolution of the injunction.

The Chancellor denied the motion, holding that the assignment to the provisional assignee under the English bankrupt law divested the title of the bankrupt to the property he brought to this country; and that the injunction was properly granted upon the application of the assignee to restrain a third person from delivering it to the bankrupt, and to restrain the latter from receiving or prosecuting for it. He also held, that the commencement of suits by the English creditors, in the courts of common law of this state, against the bankrupt, to recover judgments for their respective debts, would not defeat the effect of the assignment to the assignee. The Chancellor in his opinion, relies chiefly on the case of *Holmes v. Remsen*, 4 J. C. R. 460. He says that "in the cases cited to the contrary, the contest was between the *foreign assignees* and *domestic creditors* claiming under the *lex loci* where the suits were brought. It was probably not necessary that the creditors should have joined in this suit with the assignee, but that is no ground for dissolving the injunction." He also held that "in this case, the property was constructively within the jurisdiction of the country of the bankrupt, being on the high seas, when the provisional assignment was made." The motion to dissolve the injunction was denied *with costs*.

On appeal to the Court of Errors from this decision, that court held, that an assignee under a foreign commission of bankruptcy, is not entitled, nor the creditors before judgment, to an *injunction*, to restrain the bankrupt from receiving from the custom house here, property which was on the *high seas*

on board a vessel on its way from England to New York, at the time of the suing out of the commission. Sutherland and Marcy, Js., were for affirming the order of the Chancellor. Four of the senators, Maynard, Oliver, Allen, and Stebbins, delivered opinions for *reversal*, in which they held that an assignment under the bankrupt laws of England, to an assignee in bankruptcy, did not operate a legal transfer of the personal property of the bankrupt in this country, even as between the *assignees* and the *bankrupt*. Maynard and Stebbins, senators, held that if the property be on board a *British vessel* on the high seas, at the time of suing out the commission, and thus within the jurisdiction of England, it passes by the assignment; but if so, the fact must be distinctly averred, and will not be presumed. The order of the Chancellor was *reversed*, 17 to 4 for reversal.

FRANCHISE.

THOMPSON v. PEOPLE, 23 Wend. 537.

In S. Ct. 21 Wend. 235.

Franchise ; Toll ; Quo Warranto ; Pleading ; Verdict.

IN this case, the Supreme Court held, that on an information in the nature of *quo warranto* filed against *individuals* calling upon them to show by what warrant they exercised the franchise of maintaining a bridge across a *navigable river* and exacting *toll* from passengers, and the defendants answer that they do so by virtue of an act of the legislature, authorizing the erection of a bridge in a *specific form*, with an opening drawbridge of a specified width, and that they have in all respects, conformed to the requirements of the act granting the franchise; if on this allegation as to conformity to the terms of the grant, issue is taken and found against them by the jury, *judgment of ouster follows of course*. The court will not in such case deem the verdict imperfect because the jury have not found that the *variation*

or *departure* from the requirements of the statute, was in a *material* point, or that it was the wanton act of the grantees, or *that it was productive of injury to the public*. If any *excuse* existed proper for the consideration of the jury or the court, which might have produced a different or more favorable result to the defendants, it was held that they should have alleged it by way of pleading, and placed it upon the record, so that the court might have passed upon its sufficiency; but where the defendants placed their defence upon a *strict compliance* with the requirements of the statute, creating the franchise, and there was no exception taken as to the rejection of evidence or to the charge of the judge, the court refused to make any intendments in favor of the defendants."

The Supreme Court further held, that this was not a *private franchise* but one of a *public nature*, in which the public at large had an interest; and that an information in the nature of a quo warranto might be filed in the name of the people, on the relation of any aggrieved citizen; that in a case of this kind a quo warranto or information in the nature of a quo warranto was the appropriate remedy; and that it was not taken away by the fact that a *bond* had been executed to the state as a security for the faithful performance of the conditions upon which the grant was made; such bond being merely cumulative.

It was further held, that although the bridge was built in conformity to the requirements of the act granting the franchise, and so continued for the space of 29 years, still it appearing that for 10 years subsequent to that period, the grantees had failed to comply with such requirements; that the conditions prescribed were continuing conditions; that the bridge was to be so *maintained* as well as *erected*; therefore the non-compliance was a *misuser*, and the defendants had incurred a forfeiture of the franchise.

The Court of Errors held, however, that as the *plea* of the defendants alleged, that they had in all respects conformed to the requirements of the act, and set forth particularly, "*that they had left an opening between the centre arches of the bridge, of the width of 25 feet, for the passage of vessels,*" and the Attorney General had replied "*that a bridge was not built between the centre arches whereof, there was and*

hath been and is an opening of not less than twenty-five feet, and the jury instead of finding the defendants "guilty of unlawful holding or exercising the franchise," found, "that since the year 1825, there was not an opening between the centre arches of the width of twenty-five feet, but that at all times since 1825, the opening was of less width than twenty-five feet:—"

The Court of Errors held, that the verdict was *imperfect*, that from the finding of the jury, it did not *necessarily follow that a cause of forfeiture* existed, as it did not appear but that this *diminution in width* was wholly immaterial in respect to the object for which the opening and drawbridge were required; nor that any private or public injury had resulted from the diminution; nor but that there had been a *substantial performance* of the conditions upon which the grant was made, which is all that can be required in the performance of a *condition subsequent*, and accordingly the court *reversed* the judgment of the Supreme Court, and awarded a *repleader*.

In the other points above stated, as decided by the Supreme Court, its decision was not disturbed.

¶ The President of the senate (Bradish,) the Chancellor and 8 senators were in favor of affirming the judgment of the Supreme Court, but 11 senators voted to reverse and award the repleader, which was accordingly done by a majority of one only.

Quere? It would seem that the replication of the Attorney General should have set forth particularly the diminution of the width, and have averred that the diminution was material; that private and public injury had resulted from it, and have negatived the *substantial* performance of the requirements of the act?

The order entered after judgment of reversal, proceeds, "and it appearing to the court that the *plea* of the plaintiffs in error in the court below, and the issue therefore joined, which has been found for the plaintiff below, *does not determine the right* and that no judgment therefore *should* be given upon the verdict aforesaid, it is further ordered and adjudged that the *said parties do replead*, that is to say that

the plaintiffs in error answer anew to the information in regard to the said issue, and that they proceed, &c., until an issue or issues of law, or fact be duly joined.

FRAUDULENT CONVEYANCE.

PHOENIX *v.* DEY, TAYLOR, and another, assignees of Ingraham, a bankrupt, 5 J. R. 412-430.

Fraudulent Preference by Insolvent Debtor in alleged Contemplation of Bankruptcy.

APPEAL from the Court of Chancery. About the beginning of October, 1800, Ingraham the bankrupt became insolvent, and expressed his inability to pay his notes, which were protested for non payment. After his public declaration of his inability, he in October, November and December, 1800, made several assignments to individual creditors of lands, effects, and debts, and in particular he conveyed to the appellant, Phoenix, who was his father in law, lands, debts, and promissory notes, to a considerable amount.

A commission of *bankruptcy* issued against Ingraham, in 1801, under the United States act of bankruptcy then existing, and the respondents, Dey, &c., were appointed assignees, and received an assignment of the bankrupt's estate, in trust for his creditors. They, alleging that all the previous transfers, payments and assignments to the appellant, were made after I.'s known insolvency, when he had either committed or contemplated an act of bankruptcy, and were made with an intention to give the appellant an illegal preference, filed their bill for a general discovery, for an account, and for general relief against the appellant, and Ingraham and his wife.

The appellant in his answer. admitted the assignments, payments, &c., made to him, but denied that Ingraham committed an act of bankruptcy until February, 1801, and that

he did not know that he contemplated bankruptcy at the time the appellant took the securities ; that he continued to do business until February, 1801 ; that on a former commission of bankruptcy against I., in 1800, an inquest was taken in the District Court of the United States, in December, 1800, to try the fact of bankruptcy, when a verdict was found disaffirming that fact.

Ingraham, examined as a witness, confirmed these facts. Two other depositions were taken of *two creditors* of I., one of whom when examined as to his credit, stated that he had stopped a sum due from the bankrupt and his partners, and he had supposed they had allowed it, but he was afterward informed by them that they would not allow the set-off. The other witness was a creditor of I. at his bankruptcy, and in 1802 was himself discharged as a bankrupt. The competency of the witnesses as well as of their testimony to prove the declaration of I., in regard to his insolvency, was argued by the counsel, and considered by the Court of Errors on the decision of the cause.

The Chancellor held that the assignments and payments and transfers of securities to Phoenix, were fraudulent as against the complainants, the assignees of Ingraham, and decreed that the appellant reconvey and deliver all the property, &c., and repay all monies, &c., to the complainants. From this decree, the defendant below appealed to this court.

The Court of Errors, Spencer, J., delivering the only opinion, held, 1. That Dickson, the witness discharged, appeared to be a competent witness, but that Prime the other, his responsibility not having been discharged, was not. 2. That even if they were both competent, there was not sufficient evidence to authorize the conclusion that *Ingraham contemplated an act of bankruptcy*, within the act of Congress, when he executed the conveyances, &c., and made the payments to the appellant, which the decree of the Chancellor had declared void. Spencer, J., says: "The most that can be deduced from the evidence is, that Ingraham was insolvent ; but it expressly rejects the idea that the acts were done in contemplation of bankruptcy. Reference has been made to the answer of Ingraham, to impeach that part of his evi-

dence, which denies that what he did to secure the appellant was in contemplation of an act of bankruptcy; if it be admitted that his answer, and the declaration he made completely produce that effect, still the fact is to be made out *affirmatively*, that the preference was given to the appellant, in contemplation of bankruptcy. For, no proposition can be clearer, than that the answer of one defendant is not evidence against his co-defendant; and that the *declarations* of a party to a sale or transfer, going to take away and destroy the vested rights of another, can not, *ex post facto*, work that consequence nor be regarded as evidence against the vendee or assignee."

"There is no evidence of an act of bankruptcy contemplated, nor any circumstance from which to infer it, except the simple fact of his insolvency, and the court is without any evidence to show the nature and extent of this insolvency, and whether it was irretrievable and desperate or not."

"That insolvency is no objection to giving a preference, unless it be shown that a bankruptcy was contemplated at the time, was decided in the Supreme Court in the case of *McMenomy and Townsend v. Ferris*, (3 J. R. 82.) That principle will be found admitted and acted upon in a great variety of cases."

3. As to "how far forth payments obtained by a creditor on his application, after the debtor contemplates an act of bankruptcy but before one is, in fact, committed, are to be upheld, I confess I have little difficulty." And he cites *Hartshorne and another v. Slodden*, 2 B. and P. 586, to prove that where even the debt is not yet due, a preference thus obtained was valid, though the creditor knew the debtor was in failing circumstances, and that the motive of his conduct. Also, the case of *Thompson v. Freeman*, 1 T. R. 156.

Kent, Ch. J., was of the same opinion; Thompson and Yates absent.

Decree reversed unanimously.

ANDERSON v. ROBERTS, 18 J. R. 515.

In Ch. 3 J. C. R. 371.

Fraudulent Conveyance ; Purchaser without Notice.

THE plaintiff below, Roberts, filed a bill to set aside deeds and mortgages, &c., under which Anderson and another claimed the premises in question in the suit. The facts material to the understanding of the legal points presented, were as follows: one Griffith was seised of the premises, and made a fraudulent conveyance of them to Sarah Johnson, who on the 28th of March, 1808, mortgaged them to D. Stansbury, to secure a debt of \$330 which she owed him. After this one Taylor recovered a judgment against Griffith, under which Roberts the plaintiff claims the premises by virtue of a sheriff's deed. Stansbury's mortgage stood uninfected with notice of the want of consideration in the conveyance to S. J. Roberts was a creditor of Griffith and a purchaser under Taylor's judgment. The defendant Anderson purchased under a judgment against Sarah Johnson, and the other defendant became joint owner. They then paid S. J. \$167, and took a quit-claim deed from her of the premises. They also paid off her bond and mortgage to Stansbury, and took an assignment of it. Their answer denied all knowledge of the claim of the plaintiff Roberts to the land, until after they had paid these different sums; and stated that they had tendered to the plaintiff Roberts, the amount of his incumbrance, and they insisted that they were entitled to hold as bona fide purchasers, without notice of the fraud in the conveyance of Griffith to Sarah Johnson.

The Chancellor (Kent) said, "the only question in the case as it strikes me is, whether S. J., being a fraudulent grantee, can be the source of legal title in the defendants, assuming them to be *bona fide* purchasers for a valuable consideration, without notice of the fraud? And he held that the statute of frauds did not by the proviso in the 6th section (1 R. L. of 1813) protect a *grantee of a fraudulent grantee*; that the conveyance therefore to Sarah Johnson, being absolutely void, she could not be the source of legal title in the defendants, and that her conveyance was void as against the

creditors of Griffith, notwithstanding she had received a full consideration. On appeal,

The Court of Errors *reversed* this decision, holding that the *proviso* in the sixth section of the act, applies to the 2d and 3d sections of the statute, (or 13 Eliz. c. 5, and 27 Eliz. c. 4) and that, whether the conveyance is from the fraudulent grantor or the fraudulent grantee, and the same rule of construction governs both sections of the statute as to conveyances to defraud the grantor's creditors, or to defraud subsequent purchasers, as to titles acquired by *bona fide* purchasers, without notice of the fraud. It was also held, that the purchaser from the fraudulent grantee, must, however, be prior in time to the purchase from the fraudulent grantor or to a sale on execution at the suit of a creditor.

Decree *reversed* accordingly.

SEWARD v. VAN WYCK, 8 Cow. 406-450.

In S. Ct. 5 Cow. 70-73.

Fraudulent Conveyance ; Defective Verdict.

EJECTMENT by a purchaser under execution against Seward, defendant below. The facts of the case were as follows :

Seward, the father, held the lands as owner in fee, at the time of the deed to his son, the defendant below. He had previously guarantied the payment of a certain judgment against S., who himself had lands bound by the judgment, which at a fair valuation, might well be thought sufficient to pay the judgment. Seward the father then disposed of all his real estate, by giving to his son a full covenant deed, and taking a bond to himself for an annuity for his life ; and the son, also in consideration of the deed, gave separate bonds to two of his sisters for their portions, after which the property of S., the debtor in the judgment guarantied by the father, was exhausted by execution, and proved insufficient to pay the judgment against him. The father was then sued upon his guaranty, and judgment obtained against him, on which execution issued, and the real estate thus conveyed

to his son was sold under it to the plaintiff below. On the trial, the jury found a verdict negating all actual fraud. But

The Supreme Court held that "the conveyance by way of advancement to the son and daughters was fraudulent in law and void. That such a voluntary settlement or conveyance by way of advancement of children after marriage by a person indebted at the time, is fraudulent and void against all his creditors who were such, prior to the settlement or advancement, without regard to the amount of their debts, or the extent of the property settled, or the circumstances of the person, making the settlement or advancement; that this rule applied to a debt due from a person as guarantor; though it be contingent till after the settlement, and though it be such a debt at the time, as could not be proved under an English commission of bankruptcy, or our own insolvent acts." The court *seem* to hold that as to debts contracted subsequently, the presumption of fraud arising in law, may be repelled by circumstances.

The doctrine in *Reade v. Livingston*, (3 J. C. R. 481,) considered, and held to apply to courts of law. On error,

The Court of Errors reversed the judgment; Stebbins, Spencer, and Allen, senators, who read opinions, all concurred that the deed was not fraudulent in law. Jones, Chancellor, in an elaborate and able opinion, discusses the form of the special verdict, which instead of finding *facts*, had *found all the evidence in the case* as their special verdict; and though he evidently concurs with these senators that the deed is not fraudulent in law, and was in favor of sustaining it, yet he concludes: "I am therefore constrained to declare that I can not decide the question of law raised by the parties upon this special verdict. It is radically and substantially defective, and its defects are in my judgment, incurable in this court. The proper course in such cases appears to me, to reverse the judgment."

Judgment reversed.

See to same effect, *Rogers v. Eagle Fire Company of N. Y.* 9 Wend. 611.

WATERBURY v. STURTEVANT, 18 Wend. 353.

Fraudulent Conveyance.

APPEAL from the Chancellor. Bill by judgment creditor to set aside a conveyance as fraudulent by one of two partners (sons to appellant) of his separate real estate to his father, in payment of a partnership debt.

Sturtevant the plaintiff, had recovered a verdict against J. Waterbury, one of the partners, for \$5,000 on the 9th of October, 1828, on which judgment could not be entered up until the 18th of October. On the 11th of October, he executed to his father the conveyance sought to be set aside, of his sole property in the city of New York; the father held the joint note of his sons for \$6,500, which on receiving the conveyance he delivered up, and took the note of the other son for the balance.

The Vice Chancellor held N. W. the father, (who denied all knowledge of the property of the sons, except the property in question, and *all intent to defraud* the creditor, and insisted that his sole object was to obtain satisfaction of his debt,) entitled to protection as *bona fide purchaser*.

The Chancellor held, on the other hand, that as the father had not denied all *knowledge or suspicion* of his son's object in making the conveyance, he was satisfied that he could not do it, and that he was therefore bound to declare the assignment to the father fraudulent. He therefore reversed that part of the decree of the Vice Chancellor.

The Court of Errors however held, "that the father notwithstanding the *verdict* against his son, might lawfully secure a preference in satisfaction of a *bona fide* debt due to him, and thus prevent the lien of the verdict attaching to the real estate."

"That when the creditor taking such conveyance, does so with intent to defraud the creditor who has obtained the verdict, (as if he has other security of the debtor, &c.,) that will constitute such a fraud as to invalidate the assignment; but that taking such an assignment is not *per se* fraudulent

or evidence of fraud, as he shows a legal motive for taking the assignment, and it was received in payment of a *bona fide* debt.

Decree of the Chancellor *reversed*, by 14 to 9.

FRAUDULENT POSSESSION OF CHATTELS.

SMITH v. HOE and ACKER, 23 Wend. 653.

Not reported below.

Fraudulent Mortgage of Chattels ; Possession.

In this case the presiding judge, on the trial before the jury, had ruled that the mortgage being unaccompanied by *an immediate delivery*, and not followed by an actual and continued change of possession of the property, and no reason *sufficient in the law* being shown for want of possession by the mortgagee; the mortgage was fraudulent, and *refused to submit* the question of *fraudulent intent* as a question of *fact* to the jury.

The Supreme Court affirmed the decision; but

The Court of Errors held, 1. That the mortgage was not *void* for mere want of the possession required by the Rev. Stat., if it be made to appear on the part of the mortgagor, that it was *made in good faith*, and without any *intent to defraud* purchasers or creditors.

2. That the continuance of the mortgagor's possession, affords the highest presumption of *fraudulent intent*, amounting to *conclusive proof*, unless it be *rebutted* by such evidence as to make the good faith of the transaction appear affirmatively. The burden of proof to rebut that presumption, is thrown wholly upon the party claiming under the mortgage, and the question of *intent* is not to be determined by the court where such *proof is offered*, but it must be submitted to the jury.

COLE and THURMAN v. WHITE, 26 Wend. 511-540.

In S. Ct. 24 Wend. 121.

Mortgage of Goods and Chattels.

TROVER for a vessel.

The question as to the validity of a mortgage of goods and chattels, unaccompanied by an immediate delivery, &c., and *change* of possession, in this case, is so similar to, and so fully decided in *Hoe v. Acker*, (23 Wend. 653,) that it is only necessary to refer to the *evidence* which was offered to prove, that the case came within the principles there laid down, and which was excluded by the judge from the consideration of the jury; viz., that the mortgage was founded on a fair and adequate consideration; that it was duly filed; that the other moiety of the vessel was owned by third persons, and that the vessel was sailed on joint account of the owners, until a few days previous to the delivery. In excluding this evidence, the Supreme Court held that the Circuit Judge was right. But

The Court of Errors held, that the evidence was improperly excluded, and *reversed* the judgment. They also held that the exceptions in the statute, of contracts of *bottomry*, and of vessels in *foreign ports* or *at sea*, did not apply to the fresh water lakes of this country.

HANFORD v. ARTCHER, 4 Hill, 27.

In S. Ct. 1 Hill, 347.

Fraudulent Possession after Sale; Replevin.

REPLEVIN. The plaintiff's title was by a sale to him of the goods in question by the assignees of one Norton. After the sale, the plaintiff made Norton his agent or clerk, and the latter took charge of the goods in that capacity, as the plaintiff alleged, to sell, &c. They remained at the same store that Norton occupied. The defence was that the whole transaction was fraudulent as against creditors, one of whom had directed the defendant to levy on them in virtue of a *fi*

fa. Evidence was given to establish the defence; and on the part of the plaintiff, to prove the *bona fides* of the sale, and the possession of the plaintiffs, and to show that the assignees, before the sale to him, had had the exclusive control of the goods after the assignment. The plaintiffs proposed to ask one of the assignees this question: "So far as you are concerned was there any fraud in the whole transaction?" To which the defendant's counsel objected, and the Circuit Judge sustained the objection. Exception.

The judge charged the jury that the question of fraudulent intent was one of fact for them, and read to them the statute on the subject: That the first fact to be inquired into was whether there had been immediate delivery, and actual and continued change of possession, &c. If there had, they must find for plaintiff; if otherwise, whether there was any good reason shown, which they could approve, for the want of them. If there were, then the verdict must be for the plaintiff. If not, the law presumed fraud. But the plaintiff might rebut this presumption by showing that the assignment was made in good faith and without any intent to defraud creditors. If there was no change, it was for the plaintiff to explain. If he had done so satisfactorily, then they should find for him; otherwise for the defendant.

The plaintiff's counsel excepted to this charge, and requested the judge to charge as follows: 1. That if the jury believed the sale was made in good faith, and without any intent to defraud Norton's creditors, it was valid. 2. If they believed that the assignees had possession until the sale to plaintiff, then the employment by him of Norton as his agent or clerk, did not render the sale void. 3. That if the plaintiff actually and *bona fide* employed N. as his clerk to sell the same, this would not render the sale void. The judge refused to charge, plaintiff excepted. Verdict for defendant.

The Supreme Court on the motion for a new trial, held the ruling of the judge correct as to the question offered to be put to the assignee; and that his charge was also correct in all particulars as given; and that he was not bound to

charge on either of the points presented to him by the plaintiff's counsel. See opinion of Cowen, J., 1 Hill, p 350-351.

On writ of error to

The Court of Errors, that court *reversed* the judgment; holding that the judge's charge to the jury, "to enquire if *any good reason had been shown which they could approve, why possession had not been changed, &c.*, was erroneous, as tending to mislead the jury from the true point of inquiry, viz., the *bona fides* of the transaction," and although the judge had previously told the jury, after reading the statute to them, that the question of fraudulent intent was one of fact for their decision.

Walworth, Chancellor, who was for affirmance, observed that this is one of that interminable class of cases, arising upon the construction of this section of the Rev. Stat., &c. He denies that the case of *Smith and Hoe v. Acker*, (ante,) decides that "the proof of a sufficient consideration is of itself enough to rebut the presumption of fraud, arising from want of change of possession, as the Supreme Court had erroneously assumed in *Butler v. Van Wyck*, 1 Hill, 438. See opinion of Chancellor, 4 Hill, 274-285.

The president of the senate, who delivered an opinion for reversal, proceeded mainly on the ground that the judge had *limited* the inquiry of the jury, by his charge and by his refusal to charge as requested, to the single point if there was *any good reason shown for want of change of possession*.

Judgment *reversed*, 17 to 7.

FRAUDULENT REPRESENTATION.

ADDINGTON v. ALLEN, 11 Wend. 374.

In S. Ct. 7 id. 9

Fraudulent Representation ; Amending Declaration after Verdict.

THE judgment of the Supreme Court in this case, though in form *reversed*, was substantially affirmed. The action was *case* for a false representation as to the credit of a third party and the declaration contained several counts, some of which were defective. A general verdict having been taken for the plaintiff, the defendant moved in arrest of judgment for the insufficiency of the declaration in several counts; which motion the Supreme Court denied.

The Court of Errors *reversed* the judgment for a defect in one of the counts holding that "in a declaration in an action on the case for a fraudulent representation by means of which goods are sold on credit, and loss ensues, it must be averred that the representation was made with *the intent to deceive and defraud*, and that such averment having been omitted, the defect is not even cured by verdict." But the court, a majority holding the 3d count of the declaration sufficient after verdict, the record was ordered, on reversing the judgment "to be remitted to the Supreme Court, with liberty to the plaintiff to apply to amend the *postea* either by the notes of the circuit judge, or by the evidence set forth in the bill of exceptions so as to apply the verdict to the third count and to render judgment thereon; or in case the court should refuse such leave, then that a new trial be awarded by that court on the application of the plaintiff below, and that he be at liberty to apply to amend his declaration before the awarding of a *venire de novo*. 11 Wend. 421.

FRAUDULENT TRUST.

MURRAY v. RIGGS, 15 J. R. 571-592.

In Ch. 2 J. C. 565.

Fraudulent Trust and Power of Revocation; Fraudulent Reservation.

THIS was a bill filed by Riggs and others, assignees of Robert Murray, a bankrupt under the United States bankrupt act, by virtue of a separate commission of bankruptcy against him, issued on the 15th of June, 1801, under which his property had been assigned to the plaintiffs on the 2d of July, 1801. The bill was filed in 1802, against J. B. Murray, and J. S. Clark, to whom Robert Murray, for himself, and as attorney (duly authorized) for his partners, G. W. Murray, J. R. Wheaton, and James V. Murray, on the 23d of March, 1798, made an assignment of all their partnership property in the United States, to J. B. Murray, and J. J. Clark. The deed recited that the co-partners had become insolvent; that the assignees had advanced money, &c. This assignment was made expressly *in trust*, to sell, collect, and receive the property, and to apply the proceeds to the payment of the balances due to the trustees, and to *such other creditors* as the assignors should, by deed, within one year thereafter, *name and specify*, and on *such terms and conditions, as they, by such deed, should direct, and in default of such direction, then in trust for the grantors, and further, with power to change the trustees,*" &c.

On the 24th of March, 1798, the grantors by deed, directed the grantees to pay the expenses of the trust and retain for their own use, several sums therein specified; reserving still to themselves the power by deed at any time before the complete adjustment of the trust, within one year, to alter or revoke the appointments.

On the 21st of March, 1799, they by deed revoked the appointments, &c., of the last mentioned deed, and directed the trustees to pay the expenses of the trust, and to pay

themselves and divers other creditors specified, at the times and in the proportions expressed in the deed, *again reserving the power to alter and revoke, &c.*, as before.

On the 31st of May, 1800; the grantors by virtue of such power, directed the trustees to pay, out of the proceeds in their hands, 1. All expenses incurred. 2. Towards the support of the grantors from the 28th of March, 1798, until they should be respectively discharged from their debts, or until one year after, not exceeding \$2,000 a year, for each of them. 3. To pay certain creditors named. 4. To pay themselves certain specified debts. 5. To pay other debts due to the trustees, &c., to indemnify bail, &c. 6. That the assignees should make a final settlement with the creditors last mentioned, on certain terms mentioned, and hold the balance of the proceeds subject to the further order of the grantors; and *that the creditors who should not accept the conditions, or should knowingly embarrass the objects aforesaid, should be forever excluded from any share under the assignment.*

The bill charged that Robert Murray as partner had contracted debts to upward of \$700,000; that the assignment of 1798 was fraudulent, and made to delay, hinder and defraud creditors; that the private property of Robert Murray, exclusive of his share in the partnership property, was very inconsiderable; and the bill prayed an account from the trustees, and that they be directed to deliver up all books, &c., belonging to the estate or firm, and that they pay to the plaintiffs the balance, &c., and that the same assignments might be declared fraudulent and void.

The partners answered, setting up their discharge under the bankrupt act of the United States. The assignees answered, admitting the several deeds of assignment and appointment, and most of the facts charged, *but denied fraud in any of the transactions.* They stated that the property assigned was greatly deficient in paying the debts covered by the assignments; that James V. Murray, one of the partners, claimed to receive the funds in their hands, and had filed his bill for that purpose. They stated the amount received, and submitted to account, &c.

Clark having died, the plaintiffs, with the assent of all parties concerned, made a settlement with his executors,

agreeing to receive what was due from Clark to the estate, after deducting what was due to him, payments made by him, &c., but providing that the plaintiffs were not to be precluded from litigating the validity of the assignments, so far as respects all objects and purposes, except the estate of Clark; and it was further agreed that the defendant, J. B. Murray should account, &c., and that if it should be determined that the deeds were valid, as to all or any of the *cestui que trusts*, &c., then the trustee as creditor, and the *cestui que trusts*, to have the benefit of the balance, &c.

The cause as to John B. Murray, the surviving trustee, proceeded to issue and publication, but no proofs were taken on either side. After a reference to a master to state the accounts under the above mentioned stipulations, the report, which was excepted to by the plaintiffs, on the ground that it did not show, nor did the evidence, &c., that Murray or M. and M., were entitled to be paid out of the property assigned, &c.

The cause was heard on bill and answer.

The Chancellor. "The material question in the case is, whether the deed of assignment of the 23d of March, 1798, was not, in judgment of law, fraudulent, as against the creditors at large. That was the only deed that assigned the partnership property; the subsequent deeds between the same parties, including the one of the 31st of May, 1800, were merely directions to the trustees upon that original deed of assignment. If that deed was void, the succeeding deeds must share its fate, as they were incidental to and dependent upon it. They were all connected parts of one transaction.

"There is no further express reservation in the last deed of a power of revocation. The grantors seem at last to have grown weary of sporting with the property as their own. It may be doubted however, whether the power of revocation in the prior deed, was not still in force."

"This leads us to the consideration of the important question arising out of this case, whether such an assignment by an insolvent debtor to a few select creditors, with such a power of revocation, can be deemed valid in law. The necessary inference seems to be that it was made "to delay, hinder, or defraud creditors." The only effect of such an

assignment is to mask the property. If tolerated, it would lead to all imaginable abuses. The law is so jealous on this subject, that if the deed contains a power in any way equivalent in its effects to a power of revocation, it is fatal." p. 579-80.

The Chancellor accordingly declared the assignments fraudulent and void as against creditors; and the trustees were decreed to account for the proceeds of the property received by them under the assignment with interest, deducting their commissions and charges; and to be entitled only to come in, *pari passu*, with the other creditors, for their rateable proportion of the debtor's estate.

From this decree the assignee M. appealed to the Court of Errors, where after argument, the opinion of the court was delivered by Thompson, Ch. J. "The material question in this case grows out of the deed of the 23d of March, 1798, taken in connexion with the subsequent deeds between the same parties. It has been broadly asserted in argument, that the appellant was chargeable with *fraud in fact*. The charge it is true is made in the bill; but it is met and utterly repelled and denied by the answer, and there is not a particle of proof to make out the charge. If the transaction is to be stamped with the character of fraud, it must arise intrinsically from the deeds themselves. It then becomes a question of *fraud in law*. The only circumstance relied upon in support of the allegation of fraud is, that in some of the deeds the grantors have reserved a power to revoke and alter the trusts. This objection does not apply to the deed of the 31st of May, 1800; that is absolute and irrevocable. This, in connexion with the first deed of 23d March, 1798, would in my judgment, be amply sufficient to protect and establish the appellant's preference thereby gained. If the controversy was between John B. Murray and some person deriving title from Robert Murray and Co., prior to the 31st of May, 1800, and whilst the property was held under the revocable deeds, a very different question might be presented, but that is not the case here. The assignees of the bankrupt R. M., can take nothing but what the bankrupt himself could assign to them. 1 Atk. 191."

"All these *intermediate* deeds, if they are taken into con-

consideration as forming a part of the transaction, were not, as *between the parties to them*, absolutely void and incapable of confirmation. A deed founded in *actual* and positive fraud, as being made under the influence of a corrupt motive and with the intent to cheat creditors, may be considered void, *ab initio*, and never to have had any lawful existence. The grantee in the deed may be considered as *particeps criminis*, and is not permitted to deduce any right from an act founded in actual fraud. But this rule is not applied to contracts which are only considered fraudulent by construction of law, as being against the policy or provision of some particular statutes. Where the creditor is pursuing his debtor with a judgment and execution, or in any other manner to enforce payment of his demand, an assignment of the debtor's property, containing a *power of revocation*, may very well be considered as made to "delay, hinder, or defraud creditors," according to the language of the statute of frauds. But I do not see how it could, in any sense, be said to delay or hinder a creditor, who was taking no measures to enforce payment of his demand, as is the case now before us. This is an important feature, in which this case is distinguishable from the case of *Clark v. Hyslop*, 14 J. R. 458, decided in the Supreme Court, and on which so much reliance has been placed. Clark there was a judgment creditor, and had issued an execution against his debtor, which was levied on the property assigned to Hyslop. This levy was made at a time too, when by the very terms of the assignment, the property was not held under it; that is, after some of the creditors had refused to come in and accept of the terms proposed, and before any new trusts were declared, pursuant to the provisions in the assignment. It was with great propriety there said, that looking up property in this manner was delaying and hindering creditors." In p. 589, Chief Justice Thompson says: "The grantors having reserved to their own use for their maintenance and support a part of the property covered by this deed, forms no objection to the appropriation of the residue; though in case of a deficiency, to satisfy the creditors, they might apply to a court of equity for the appropriation of the property so reserved, towards the payment of their demands."

"The power reserved to the grantors to revoke and alter the trusts, forms the sole ground of exception. The respondents come here as assignees of Robert Murray, under a title derived from him, after his assignment to John B. Murray, was confirmed and made *irrevocable*. In my opinion, therefore, the decree which declares these deeds null and void ought to be reversed."

A majority of the court concurring with the Chief Justice, the decree of the Chancellor was *wholly reversed*, on the ground that the assignment of the 31st of May, 1800, was legal and valid.

✎ The foregoing case would appear to have been questioned from the outset, both as to the *validity* of the reservation for the benefit of the grantor in the deed of the 31st of May, 1800, and as to the *effect* of it upon the validity of the deed itself. In the case of *Austin v. Bell*, 20 J. R. 442, it came under the review of the Supreme Court, after Chief Justice Thompson had left the bench of that court. In that case there was a similar reservation, among others, for the benefit of one of the grantors, "*for the maintenance and support of himself and his family, until the first day of May, 1820, not exceeding the rate of \$2,000 per annum*."

Spencer, Chief Justice, in delivering the opinion of the court, says:

"The grounds on which the assignment is supposed to be legally fraudulent are, that it contains stipulations, reserving such sums as are necessary to defray the expenses of defending suits at law or equity against the assignors, in relation to the trust created; and for services in obtaining or endeavoring to obtain the discharge of the assignors from all their debts; and also such sums of money as the trustees may be obliged to pay to E. S. (one of the assignors) for the support of himself and family, &c.; and also, because with respect to creditors who should neglect or refuse to execute the deed, their proportion should be paid to the grantors.

"The case of *Murray v. Riggs*, decided in the Court of Errors, (15 J. R. 571,) bears upon some of the objections made to this assignment. It appears that a majority of the court concurred in the opinion of Chief Justice Thompson;

and that the decree of the Court of Chancery was reversed on the ground that the assignment of the 31st of May, 1800, was legal and valid. *We are bound by that decision, whatever our private opinions may be as to its accuracy or solidity.* As to the reservation in that case, the Chancellor was of opinion on the strength of *Estwick v. Caillaud*, 5 T. R. 420, that it did not destroy the provision as to the residue; and he intimates an opinion that if the part not reserved was deficient, the creditors might apply to a court of equity for the residue. In this part of the Chancellor's opinion, Chief Justice Thompson concurred. This then puts an end to the objection made to this assignment, as to a reservation of a support for a limited time for one of the assignors; and it is equally decisive of the other objections as to defraying the expenses of suits, and of endeavoring to procure their discharge; for they fall within the same reason."

"The only remaining question is, whether the stipulation reserving to the assignors the proportions of such of the creditors as neglected or refused to execute the assignment, renders it fraudulent and void."

He then proceeds to show that the court had already in effect decided this point in the case of *Hyslop v. Clark*, 14 J. R. 458. "That case," he says: "was decided in October term, 1817, and the case of *Murray v. Riggs*, in February, 1818. Chief Justice Thompson assented to the decision in *Hyslop v. Clark*, and it can not be admitted that he intended to overrule that case by anything he said in the case of *Murray v. Riggs*. The contrary, in truth, appears, from his distinguishing between the two cases, as has already been mentioned. Mr. Justice Van Ness, who delivered the opinion of the court, said "that it was also one object to coerce the creditors to acquiesce in the terms offered them, and that therefore that part of the assignment was void under the statute of frauds; and that being void *in part as against the provisions of a statute*, it was *in toto*; and in this opinion the court unanimously concurred. Now, I can not perceive any material distinction between the case of *Hyslop v. Clark*, and the one before us, unless, indeed, it be that this is a stronger case of legal fraud." And the *whole deed* was accordingly declared to be fraudulent and void.

Although the case of *Murray v. Riggs*, was thus professedly acquiesced in, it is easy to see, that practically, "its accuracy and solidity," as Chief Justice Spencer expressed it, were denied, and its authority by one distinction or other always evaded. It would have been better to have denied it to be law at once, than to go on professedly recognizing it as a binding precedent, and yet always contriving to circumvent the principle of the decision; holding it to be binding as to one point, and then wholly disregarding it as to *another*; as Chief Justice Spencer's opinion does with regard to *fraud in law*; or, as Chancellor Sandford did in the case to which we shall presently come, holding it to be a case, *sui generis*, and "*decided upon its own peculiar circumstances*," but yet "*an authority for any case like itself*." The case to which we allude was the following one, in which it will be found that the case of *Murray v. Riggs*, as to every point bearing upon the effect of such a reservation upon the validity of the *whole deed*, as well as the validity of the reservation itself, was finally placed in the *Index Expurgatorius* of our state jurisprudence.

MACKIE and others v. CAIRNES, SEDGWICK and LORD, 5 Cow. 547.

In Ch. 1 Hopkins' R. 373.

Fraudulent Trust, and Reservation for Benefit of Assignor.

CAIRNES, a merchant possessing considerable property and being largely indebted became insolvent, in March, 1823. On the 25th of that month, on the 7th and 18th of April, and on the 29th of July in the same year, he executed to Sedgwick and Lord, certain instruments, by which he conveyed to them all his property in trust. The several trusts were expressed in those instruments; the creditors were thereby ranked in classes, and were to be paid in a certain order of priority. The first of the deeds declared one of the trusts in the following terms: "In trust, that the said S. and L., shall first pay out of the proceeds of the assigned prem-

ises from time to time, for the support of the said W. Cairnes and his family, after deducting all costs and reasonable charges of the said S. and L., at and after the rate of \$2,000 per annum, until the said W. C. shall be discharged from his debts under some insolvent or bankrupt law or otherwise; such however not to endure beyond four years." p. 395.

On the 1st of August, 1823, Cairnes confessed a judgment in favor of the assignees, S. and L., for \$96,000, with a view to use the same as a *security* to protect the property in their hands as assignees. Mackie and other judgment creditors of subsequent date, charged that this judgment of S. and L. was collusive, and made with intent to hinder and delay them from obtaining payment of their judgment, &c.

Sandford, Chancellor, says: "The judgment was for the sole purpose of securing the creditors intended to be preferred. A judgment confessed to trustees, is one method of giving a preference, and securing payment, and such judgments are held valid by our courts. To consider this judgment as given and taken upon the trusts expressed in the antecedent assignments would be a violent presumption in opposition to all the facts, as they stand before the court." He accordingly held that the assignees were entitled to the fund in question.

But upon the question of *costs*, he took occasion to examine the validity of the assignments. After reciting the trust in favor of Cairnes, he asks:

"Are these assignments valid or void? And what is the legal effect of the trust in favor of Cairnes, the grantor?"

"So far as the conveyances made by Cairnes were for his *own use*, it is most evident that they were intended to secure the portion of his estate reserved to himself, against the legal remedies of his creditors. These were then conveyances made to defraud and hinder the creditors of Cairnes.

"But it is urged that these assignments if void, are only so in respect to the portion set apart by C. for his own use; that even as to that portion they are valid in law and void only in equity; and that the assignments not being wholly void, they form a legal title in the assignees, against Mackie, Milne and Lockhart, as creditors.

"The statute enacts that every conveyance made to hin-

der or defraud creditors, shall be clearly and utterly void ; and it is repugnant to the terms and sense of this provision, that such a conveyance should be partly void, and in part not void. It is said that adjudged cases have established such a distinction, and those cases must be considered."

The Chancellor then examines the case of *Estwick v. Caillaud*, 5 T. R. 420, and the case of *Murray v. Riggs*, ante. As to the first, he says ; "it did not determine that a debtor who is insolvent, may assign all his property in trust first, for his own use, and next, for the payment of some or all of his debts." As to *Murray v. Riggs*, he says "that case was very peculiar. But as I understand that case, the Court of Errors did not determine that *every* assignment made by an insolvent debtor of all his property in trust, first for himself, and next for certain of his creditors, is valid either in whole or in part.

"No creditor of the bankrupt complained of the assignment. This circumstance was considered very material by Chief Justice Thompson." In page 401, the Chancellor again says, "This case then, in its circumstances, is altogether different from the case of *Murray v. Riggs*. That case was decided upon its own peculiar circumstances, and is authority for any case like itself. I can not understand the Court of Errors to legalize by one universal rule, these reservations of an insolvent debtor for his own use ; but I understand by their decision that in special cases of *peculiar equity*, the *whole* assignment shall not be subverted by this illegal trust.

"The reservations for the benefit of Cairnes, being illegal and void, are these assignments void only in that respect, or are they void in all their parts? It is an ancient principle that when a deed is made void by a statute, it is void throughout ; that the courts can not separate the deed into distinct parts and give effect to those which are legal, while they may annul those which are illegal ; but that the whole must be adjudged null.

"This decision destroying the assignments destroys the preference provided by those instruments. The property of the debtor is to be distributed rateably among all his creditors, or if any have a preference, it is only by the ordinary

remedies of law against him." The Chancellor then decreed costs to S. and L. out of the fund in controversy, and left the rest of the costs as in the decree of the Circuit Judge from which the appeal in this case had been taken.

From this decree the assignees of Cairnes appealed, and the validity of the assignment and of the judgments was fully discussed and passed upon by the Court of Errors.

Sutherland, J., who delivered an opinion in favor of affirming the decree of the Chancellor sustaining the judgment, also maintains the validity of the assignments of Cairnes, and of all the reservations in it, 5 Cow. p. 553-566, and he examines the case of *Murray v. Riggs*, very fully; maintaining its binding force on authority and on principle; and that it was fully supported by the case of *Estwick v. Caillaud*, relied on by Chief Justice Thompson. In page 563, he says: "Nor am I dissatisfied with the decision in *Murray v. Riggs*, upon principle. I fully agree with the Chancellor and with the decision in *Hyslop v. Clarke*, that if such a provision (for support of assignor) is to be considered conclusive evidence that the conveyances were made with an intent to hinder and delay creditors, it must avoid and destroy the whole assignment; because the statute has declared that all conveyances made with an intent to defraud, shall be absolutely void and of none effect. It is for that very reason, believing that cases may exist, in which such a provision would be neither unjust nor improper, that I would hold it voidable only upon application to a court of equity, and not absolutely void within the statute."

Colden, Senator, who held the assignment and judgment confessed by Cairnes both void, also treats the case of *Murray v. Riggs*, as one that ought "in cases *precisely similar in all its circumstances*," to be the rule and guide of the court. "But," he adds, "I shall not attempt to give any other reason for my opinion, than that this court, in the case of *Murray v. Riggs*, has decided that such an assignment under such circumstances, is good."

Chief Justice Savage also delivered an opinion in favor of the reversal of the decree of the Chancellor, as to the validity of the judgment, in which he discusses the validity of

the assignment, and the authority and principle of the case of *Murray v. Riggs*. He says: "In my judgment all depends upon the validity of the assignments, particularly that of April 18th, 1823. It purports to be a conveyance of the very property out of which the fund in question arises. If it did, then clearly Cairnes was not the owner, when the judgment against him was docketed. If the assignment was fraudulent and void as against creditors, it was valid between the parties. They can not say it was fraudulent."

"I lay the judgment entirely out of the question. Had the plaintiffs intended to rely on it, they should have released to the defendant the property on which it was to become a lien."

"The question then recurs, were those assignments valid; or if not, were they void in part or *in toto*? Suppose the debtor finding himself in failing circumstances, had conveyed the whole of his property to assignees, in trust for himself; could there be a question upon the subject? When a debtor fails, his property in moral justice belongs to his creditors. He is permitted to prefer in payment such creditors as he pleases. This is giving him power enough; but where he appropriates the property to his own use, the act becomes fraudulent, nor does it lie in his power to prescribe terms to his creditors. The law is open to them. They have a right to pursue their debtor in the mode pointed out by law, and any act which obstructs them in their pursuit is against law, and of course void; unless such act appropriates the property to the payment of debts."

The Chief Justice then considers the question as to whether the assignment is void in part only or *in toto*, and he holds the question settled by the cases of *Hyslop v. Clarke*, and *Bell v. Austin*, which declare such assignments void *in toto*. How far it is impaired, if at all, by *Murray v. Riggs*, he next considers.

After citing the opinion of Chief Justice Thompson on the point of the reservation in that case, as "forming no objection to the appropriation of the residue," he proceeds to examine all the cases cited by him, and comes to the conclusion that the proposition laid down by Chief Justice Thomp-

son "has no adjudged case to support it." He proceeds, p. 584,

"But if the case of *Murray v. Riggs*, is to be considered as authority in this case; (and Chief Justice Spencer so considered it in the case of *Austin v. Bell*, though he evidently denied its correctness,) if it must be met, then I would ask, in the very appropriate and forcible language of the present Chancellor, "Is it *law* that every insolvent debtor in this state, may by assigning all his property in trust, secure to himself an allowance of \$2,000 a year, or any other sum from his own property?" And, I will add, is it not directly against the statute? Our laws have specified what property of a debtor the creditor shall not take from him. Any attempt of a debtor to set apart a fund for his own support, must be fraudulent and void. If he may take \$2,000 a year, why not \$5,000? And if for four years, why not for ten or even twenty, as in the case of *Murray v. Riggs*? To state such a proposition, is a sufficient refutation of it. It offends the moral sense; it shocks the conscience and produces an exclamation! It is directly against the statute, and can not stand before it."

He then proceeds to show, that even if the assignment of Cairnes as it was admitted, could be considered a valid one as to this reservation, that the creditors would be entitled to it by an application to a court of equity. "If, therefore, it is admitted that these creditors would be entitled to it by filing a bill expressly for that purpose, then, I would ask, why turn them out of court, when it is admitted that, if they come in a different attitude, they will be entitled to what they ask? For whose benefit are we to direct all this circuitry of action? Surely not for the benefit of the creditors, nor yet for the benefit of the insolvent."

A majority of the court concurring in the result of the opinions of Savage, Chief Justice, and Colden, senator, the decree of the Chancellor sustaining the judgment was *reversed*: and the assignment made to the said R. S. and D. L. jun., was declared to be void "*by reason of the trust or provision contained therein for the benefit of the said William Cairnes.*"

The surplus moneys in court, arising from the sale of the

mortgaged premises for the sale of which the original suit was instituted, were decreed to the judgment creditors, Mackie, Milne, and Lockhart, 1st for their debt and 2d for their costs; and if not sufficient to pay all their costs in the Circuit Court and Court of Chancery, then so much of the costs as had accrued since the order for the sale of the mortgaged premises, to be paid by Cairnes, Lord and Sedgwick, personally.

Decree of Chancellor thus *reversed*, 14 to 9.

Thus, no part of the case of *Murray v. Riggs*, appears to have been left, after this decision in *Mackie v. Cairnes*. The Court of Errors, by the form of its judgment, seems to have been anxious to extinguish the last spark of its vitality.

In the case of *Grover v. Wakeman*, 11 Wend. 187, the validity of a stipulation for the release of the debtors, as a condition of the preference of a certain class of creditors, came directly in question; and the Court of Errors affirmed the Chancellor's decree, declaring the whole assignment void, upon the principles held by Chief Justice Savage, in *Mackie v. Cairnes*. Though the construction of the clause in the assignment in *Grover v. Wakeman*, which was held to exclude those creditors who refused to release, from all benefit and participation in the fund, was questioned in an able opinion for *reversal* by Senator Edmonds, late Circuit Judge, and now of the Supreme Court; yet he admitted that if the construction of the Chancellor were the correct one, then the assignment was wholly void. But he maintained that the creditors of the 2d class, by the true construction of the clause in question, were not totally excluded, but came in for their *pro rata* share with the creditors at large, if they refused to release. If this were the true construction, he insisted that the assignment was free from all fraud in law, and the clause a legal and valid provision. See the opinion of Edmonds, senator, 11 Wend. 204-215.

The majority of the court adopting the Chancellor's conclusion, his decree was *affirmed*. It is true that on motion of Mr. Justice Sutherland, whose opinion in the case forms a rather curious contrast with that delivered by him in the

Court of Errors in the case of *Mackie v. Cairnes*, the following *resolution* was adopted.

"Resolved, that the assignment is void, because it makes the preference given to the creditors of the assignors designated as class No. 2, to depend upon the condition that the preferred creditors shall give the assignors an absolute discharge of their debts."

This was passed by aff. 15, neg. 5.

This *resolution* of the court, if to be considered as based upon the construction given to the clause of preference by Senator Edmonds, and adopted also by Mr. Justice Sutherland, seems to settle the question against the conclusion of the former in favor of the validity of the assignment, upon *his* construction of the clause of preference.

GRANT.

WETMORE, appellant, v. WHITE and WHITE JR., respondents.

2 C. C. E. 87-110. Chancellor's opinion id. 91.

Grant of Interest in Mills and of Water Course, as Incident; Specific Performance.

THE appellant being seised of 250 acres of land on the east side of Saghquate creek in Whitestown, together with half the soil under water, and the respondent White, senior, the father, being seised of 300 acres on the west side, with the other half of the bed of the creek; they entered into a verbal agreement, in the year 1787, to divert, on their joint account for the use of mills to be erected, the water of the stream to such spot on the land of either, as should in the opinion of one Beardsley, be most proper for the site of a mill. The latter fixed upon a spot on the land of Wetmore. Wetmore, White senior, and Beardsley, then, 13th of May, 1788, executed a written agreement to build a grist mill on

Wetmore's land, a few rods north of his house; he and White to "*own*" each one fourth of the mill, in consideration of furnishing all materials, &c., and erecting the dam to turn the water of the creek; Beardsley to own the other half on doing the carpenter's work &c. Upon these terms, the mill and dam being completed in 1788, it was verbally agreed between the *same parties*, to build adjoining to the grist mill a saw mill, to be supplied with water in the same manner, and to be "*owned*" in equal proportions by the three. This also being carried into effect, the mills were used in the same manner for about three years; when, being very much out of repair, Beardsley, in 1791, transferred his interest in them for \$600 by release to the appellant, who shortly after bought the interest of White, senior, for \$187, and paid the money, but received no conveyance of it, nor was anything said of the right to the water of the creek.

The appellant repaired the grist mill and entirely rebuilt the saw mill and quietly enjoyed both, for the space of one year, when they were accidentally burnt down.

The appellant then, at great expense, rebuilt them and continued in the enjoyment of the mills and of the use of the water of the creek, until August, 1797, when the respondent Hugh White, the father, threatened that he would cut down the dam and deprive the appellant of the use of the water, unless he would become a *Presbyterian*, and join the congregation under the charge of the Rev. Bethuel Dodd, and that he would also build a dam and turn one half of the water of the creek over a meadow contiguous to the Saghquate creek, and adjoining to the dam erected for the use of the mills; which meadow on the 25th of April, 1794, the father had, in consideration of blood and affection, conveyed, with a moiety of the waters of the creek, to his son Hugh White, junior, the other respondent.

In September and October, 1797, the dam across the creek, was, to the great injury of the mills, three times cut through and the water permitted to escape.

On the 5th of December, 1797, the appellant filed a bill in Chancery, stating these circumstances, praying an injunction to restrain the respondents from molesting or disturbing him in the enjoyment of the mills, mill-dam, and the water

of the creek, that he might be quieted in his possession of them, and for such further and other relief as the court might please to direct.

The answer of the respondents admitted the parol agreement to erect the mills and dam; the written agreement, the sale by White, senior, "*of his shares in the mills*"; the payment of the consideration money; that the mills were burnt down and rebuilt, &c., but denied that the *right or privilege* in the waters of the creek had ever been parted with to the appellant, or that he had paid any consideration for it; or, that he had any right to appropriate the waters of the creek to the use of the mills; or to maintain the dam for the purpose of turning the stream from its usual course. That soon after the destruction of the mills, White the father explained, as he believed, in a conversation with the appellant, the nature of the contract for the sale of the mills and then utterly denied the appellant's right to the water; that the appellant had never requested a conveyance of the right of water, and had from a consciousness of his having none, erected a temporary dam at his own expense, below that for the use of the mills, in order to turn the water into the respondent's meadow, the want of which, in consequence of the upper dam, actually injured the crop of hay, and could not be compensated for, by even \$1,500. They also insisted on the statute of frauds.

From the testimony of two of the witnesses, it appeared that the understanding of the parties at the time of the first parol agreement was, that wherever they were built, "there the waters were to go." That Beardsley who was examined as a witness, considered the *right to the water* as perpetually annexed to the mills, and never entertained any apprehension of its being liable to be taken away.

Upon this state of facts and the proofs, the Chancellor *dismissed* the bill with costs. See opinion of Chancellor Lansing, 2 C. C. E. 91.

1. As to the parol agreement, he said "Upon the whole, I do not think the parol agreement is made out in proof; admitting the evidence to be competent to sustain its variant from or enlarging the written contract, and the parol contract admitted by the answer, relating to the saw mills. It

is therefore unnecessary to examine the influence of the statute of frauds and perjuries on the case."

2. As to the written contract.

"This has no words evincive of the intent of the parties to perpetuate this joint interest, beyond the duration of the mill, which was the object of it." "The mills were destroyed by fire; and White, senior, declares in his answer that he informed the appellant, before he rebuilt them, that the water was his, and that he had *not* sold it. This rebuts the deduction which might otherwise be made from his tacit acquiescence in the rebuilding of the mills. I am persuaded that the better construction is that the reciprocal interests of the parties were to be affected merely, while the principal objects of this enterprise, the mills, endured; that those destroyed, it ceased to operate."

From this decree Wetmore appealed; a few extracts from the opinion of Thompson, J., who delivered the only one, will sufficiently show the grounds of *reversal*.

Per Curiam, delivered by Thompson, J. "The controversy between these parties presents the following questions for examination. 1. Whether the respondent ever acquired any right to the waters of the creek for the use of the mills? 2. If so, whether it was a temporary or permanent right? 3. Whether, the purchase being by parol, the respondents can avail themselves of the statute of frauds to avoid it?

He then shows that from the evidence and the acts of the parties in digging a canal and erecting the dam, "that there was an *agreement* to divert the natural course of the creek, the object of which clearly was for the use of the mills. By a sale of the mills, generally, I should therefore incline to think the water would pass as an *incident* to them, without any special provision. Indeed it was not denied on the argument, but that the appellant had acquired a right to the use of the water, co-extensive with the duration of the first mills built."

"But it is not necessary to say, the right to the water passed as an incident to the mills, in the sense above mentioned: or, that the appellant acquired this right, at the time he *purchased* the mills. It was, I think, amply secured by a prior contract." "I consider the effect of this *agreement*

as an *appropriation of the water* to the use of the mills; that it thereby became, in some measure, an appurtenance to them; and that, under such circumstances, a grant of the principal subject would pass the water, as an *incident*."

"The next inquiry is, whether this contract vested a permanent, or only a temporary right to the use of the water?" After reviewing the evidence as to this, he says: "The conduct of White, in not disclosing to Wetmore, at the time of selling [his interest in] the mills, his claim of restoring the water to its original channel; his sleeping so long upon his claim; and permitting the appellant to expend his money in repairing and rebuilding the mills; these were unconscientious, and form strong grounds for the interposition of a court of equity."

"The appellant's claim resting altogether upon parol contracts, it becomes necessary to examine whether any obstacle to relief is interposed by the statute of frauds? I think there is not. The consideration money has been paid; possession has been taken; and valuable improvements made. I can therefore see no objection to granting the appellant such relief as will quiet him, in the permanent enjoyment of the water, to the extent it was used and enjoyed at the time he purchased from the respondent White. This is sufficiently certain and definite for a decree for a specific performance."

Judgment of reversal, unanimously.

HABEAS CORPUS.

JOHN V. N. YATES, plaintiff in error, v. THE PEOPLE OF
THE STATE OF NEW YORK, defendants in error.

In Ct. of E. 6 J. R. 337-523. In S. Ct. 4 id. 317-354.

(Note by the reporter. "This case is so entitled in the record returned by the Supreme Court, though the proceedings before that court were *ex parte* Yates.")

Commitment by Court of Chancery, for an Offence "Against the Statute," &c., and a Contempt; Discharge on Habeas Corpus by Judge of Supreme Court in Vacation; Re-commitment by Court of Chancery; Habeas Corpus to Supreme Court; Writ of Errors to Court of Errors; Supersedeas by Court of Chancery of Writ of Error, quia improvide emanavit; Writ of Error to Judgment of Supreme Court on Habeas Corpus.

THE plaintiff in error, having had a complaint preferred against him by one Bacon, charging him, then a *master*, but not a *solicitor*, of the Court of Chancery, with having exacted from him 18 dollars, under the false pretence of being a *solicitor*; and subjecting him to great delay and trouble in a suit in that court; was examined, *ex parte*, and an attachment issued against him. This order was afterwards opened on his application, so as to allow him to make his defence. When that was gone into, it was not denied that he had acted as *solicitor*, and received the money, but he alleged that he had filed the bill in the name of Peter W. Yates, a *solicitor*, and with his consent. This the latter denied. The result was that he was committed by the Chancellor for mal-practice and *contempt*. He then obtained a writ of *habeas corpus* from Mr. Justice Spencer, in vacation; and upon hearing before him, that judge declared the conviction illegal and void, and ordered his discharge. He was accordingly discharged, but the Court of Chancery reclaimed him, as its prisoner on the attachment, and he was accordingly remanded to the same custody. The prisoner then brought a writ of *habeas*

corpus to the Supreme Court, where it was urged that he was entitled to his discharge on three grounds; viz.:

1. "That the matter laid to his charge was an *offence prohibited by statute*, and therefore not cognizable in the Court of Chancery, which has no criminal jurisdiction; nor is it punishable anywhere, by an attachment for a contempt."

2. "That the conviction was founded upon evidence which the law does not hold sufficient to warrant a conviction, even for a contempt."

3. "That the imprisonment being in execution and conviction, should be definite and terminate either by the efflux of time, or on the doing some act by the prisoner, and cannot be indefinite and uncertain, as "until the further order" of the authority inflicting it." p. 476.

The Supreme Court, however, held the *conviction* and commitment legal and valid; and the prisoner was remanded. It appears that he was then again, a third time, recommitted by the order of the Court of Chancery, upon which he was again liberated by the recorder of Hudson, acting as a commissioner of the Supreme Court.

The party sued out his writ of error, however, to the Court of Errors, to reverse the judgment of the Supreme Court. But before any return made thereto by the justices of that court, the Chancellor *ex mero motu*, as it would seem, issued out of the Court of Chancery, a writ of *supersedeas* to the writ of error issued out of Chancery, as was then the course of justice, to carry the cause to the Court of Errors. The writ of *supersedeas* was in the name of the people, and directed to the justices of the Supreme Court, and recited the issuing the writ of error to the Court of Errors, out of the Court of Chancery, and then proceeded: "Nevertheless, because that writ, out of our said Court of Chancery, *improvidently and irregularly issued*, therefore we command you, that from sending the records, proceedings and writ of error aforesaid, before our said president, senators, and Chancellor, yon entirely desist and supersede." Tested 1st Sept., 1809.

On the 5th of February, 1810, the cause came before the Court of Errors, on a motion *ex parte* Yates, to that court, for an order "that the justices of the Supreme Court of judi-

cature, forthwith make return to the writ of error allowed and filed in this case, according to the exigency of the writ."

On the 13th of February, the court having heard the Chancellor assign his reasons for issuing a *supersedeas* to the writ of error, made the rule absolute.

On the 15th, the writ of error was returned by the Supreme Court, with their certificate and return annexed to the writ, stating that the writ of error was filed in the clerk's office on the 12th of September last, and that on the 28th of Sept., the *supersedeas*, which was annexed to their return, was also filed in the clerk's office. They then concluded: "The said justices are accordingly unadvised what of right ought to be done in the premises; as they humbly apprehend that it appertains to your honorable court and not to them to determine, whether the said writ of error be valid and operative notwithstanding the said writ of *supersedeas*, or whether it be null and void, by reason of the said *supersedeas*."

"If your honorable court should adjudge it (the writ of error) inoperative, no farther return will be required; but if your honorable court should adjudge it valid and operative, the said justices are ready to obey the said writ of error, by making a return according to the requisition thereof. All which is humbly submitted.

James Kent, Chief Justice."

This return having been read, the court directed the *Attorney General*, on the one side, and the counsel of Mr. Yates on the other, to argue the preliminary question, "whether the Chancellor had a right to issue the *supersedeas*, and whether it was not null and void?"

After a learned and elaborate argument, a majority of the court, 19 to 9, were of opinion that the return was insufficient, and that the *supersedeas* was a nullity.

A further return was then made by the Supreme Court, containing the *habeas corpus* on which Mr. Yates had been brought before it; the return to that writ by the sheriff of Albany, and of the judgment of the Supreme Court awarding a *remittitur*. It also showed the attachment issued by the Court of Chancery; two several orders for the discharge of Mr. Yates by Mr. Justice Spencer, in vacation; and the or-

der of the Court of Chancery, reclaiming him as its prisoner on the attachment.

After reading this return, a motion was made that the writ of error *be quashed*; and the court again directed the Attorney General on the part of the People, and the counsel for Mr. Yates, to argue the question, "whether a writ of error would lie in this case? After another elaborate argument,

Spencer, J., and Yates, J., delivered opinions in favor of sustaining the writ; Thompson, J., and Kent, J., for quashing it, with whom Van Ness, J., concurred. The Chancellor, of course, was in favor of quashing the writ of error. The question was stated to be "*whether a writ of error would lie on a judgment of the Supreme Court, on a habeas corpus?*" and a majority of the court, 16 to 12, held that a writ of error would lie in this case; and that the writ ought not to be quashed.

Another argument by the same counsel, then took place on the general questions raised in the court below.

The Supreme Court (S. Ct. 4 J. R., 317 to 354,) had decided: 1. That Mr. Yates, having been committed by an order of the Court of Chancery, his discharge by a judge of the Supreme Court in vacation, on *habeas corpus*, was not conclusive, either upon the Court of Chancery or the Supreme Court; and the prisoner may after such discharge, be again committed for the same cause.

2. That the order of the Court of Chancery, committing him, stating that he had while he was master, filed a bill to which he subscribed the name of one of the solicitors of the court, without his knowledge or consent, and prosecuted the cause in his name, "contrary to the statute in such case, made and provided, in wilful violation of his duty as master; and in contempt of the authority of the court;" and "for the said mal-practice and contempt, the said J. V. N. Yates, was ordered to be committed to gaol, there to remain until the further order of the court," was a legal and valid commitment for a *contempt*; even if the party might have been indicted for an offence against the statute concerning counsellors, solicitors, and attornies. But whether it

was an *indictable offence* within that statute, was not decided.

5. That the Supreme Court has no power to discharge a person committed by the Court of Chancery for a contempt; and it will presume that the proceedings of that court were legal; and that the conviction for the contempt was on sufficient and legal evidence.

6. That a commitment "until the further order of the court," is good.

The Court of Errors having heard argument of these and other questions, raised upon the return; a majority of the court voted to *reverse* the judgment of the Supreme Court upon the *habeas corpus*; Lansing, Chancellor, delivering the only opinion in favor of affirmance, and Dewitt Clinton, senator, the only one in favor of reversal.

✍ The reporter in a note to this case, says: "As no other members of the court assigned their reasons, but answered simply in the affirmative or negative, I have considered the majority, who were of opinion that the judgment of the Supreme Court ought to be reversed, as concurring on all the grounds expressed in the opinion above delivered; (by Clinton, senator,) and have accordingly so stated the points as decided in the cause, in the marginal note, pp. 337, 338."

We accordingly give the points as stated by Mr. Johnson, with some slight verbal additions, merely explanatory.

Preliminary questions decided.

I. The Court of Chancery has no right to refuse a writ of error, or to supersede it, after it has issued, in any civil case or in a criminal case, not capital.

II. A writ of error will lie on a judgment of the Supreme Court, on a *habeas corpus*." On the merits:

1. That the order of commitment in this case, reciting that one of the *causes of commitment*, was "*for an offence against the statute*," of which the Court of Chancery had no jurisdiction, the whole order was illegal and void.

2. The Court of Chancery can not commit for a contempt, on the *affidavits of witnesses only*, without first putting the party to answer to interrogatories.

And *semble* that courts of justice can not commit for con-

tempts, for an indefinite time ; or until the further order of the court.

3. A judge of the Supreme Court has the same power under the *habeas corpus* act, which the court itself possesses at common law, except in cases of treason or felony. If a judge, in vacation, discharges a prisoner brought before him on *habeas corpus*, such discharge, whether erroneous or not, is final and conclusive, and the party can not be again imprisoned for the same cause, unless by order of the court in which he is *recognized to appear*, or other court having jurisdiction of the cause ; and that in this case the Chancellor could not recommit the party for the same cause.

4. A person out of court can not be committed for a contempt, by an *order* of the court, without a writ or warrant ; nor can a person who has been regularly committed, and afterwards set at large by order of a judge, be recommitted, by an *order* of the Court of Chancery, grounded upon and reciting the original writ of attachment.

5. Where the Court of Chancery commits a person for an offence "against the statute relative to solicitors and others," also for *contempt*, the whole is void, and a judge in vacation, or the Supreme Court in term time, may discharge the prisoner on *habeas corpus* ; and *it seems* that a judge of the Supreme Court, or the court, may discharge on *habeas corpus*, a prisoner committed by the Court of Chancery for contempt only, and that a prisoner may be discharged on *habeas corpus*, though the conviction or judgment on which he has been committed, remain in full force.

✍ The foregoing decision of the Court of Errors, was afterward brought under review in the Court of Errors in February, 1810 ; and in elaborate discussions at the bar, and by two members of the court on opposite sides, its authority was questioned, and opposite conclusions according to the marginal note of the reporter, adopted on every material point decided in *Yates v. The People*.

This review took place in the suit commenced in the Supreme Court by Mr. Yates, to recover the penalty of

\$1,250, against the Chancellor, under the 5th section of the *habeas corpus* act, for the re-commitment of the party after his discharge upon *habeas corpus*.

JOHN V. N. YATES, plaintiff in error, v. LANSING, defendant in error.

In Ct. of E. 9 J. R. 394-442. In S. Ct. 5 J. R. 282-299.

Action against Judicial Officer for re-committing Prisoner Discharged on Habeas Corpus, to recover penalty under Statute ; Liability of Judge for Judicial Act ; Power of Court of Chancery to Punish Contempt, &c., and to re-commit Prisoner, &c.

THIS was an action of debt, brought against the defendant, Chancellor of the state, to recover the penalty of \$1,250, under the 5th section of the *habeas corpus* act, which declares "that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court, wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause ; and that if any person shall knowingly, contrary to this act, re-commit or imprison, or cause to be re-committed or imprisoned, for the same offence, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved, \$1,250, any colorable pretence or variation in the warrant of commitment, notwithstanding." 1 R. L. of 1813, p. 355.

The action was, of course, founded upon the acts of the defendant, Lansing, as Chancellor, set forth in the preceding case just given, and it is hardly necessary to the understanding of the issues made, to do more than refer to that case without more particularly stating the pleadings. The plaintiff's declaration set them forth, and the defendant justified the acts as done in his judicial capacity as Chancellor ; to which there was a general demurrer and joinder.

The argument of the cause was merely *pro forma*, in the Supreme Court ; though Kent, Ch. J., urged the argument of the point, as one "of very great importance, which was

not argued or decided in the case of Mr. Yates, on the *habeas corpus*; viz., whether the Chancellor while acting officially and judicially, is responsible, in this action, for what he has done as Chancellor?" Mr. Emmet, however, of counsel for the plaintiff, declined to argue it, intimating that a writ of error was to be brought. The court, very properly, took time to consider it, and held that the action would not lie.

Kent, Ch. J., delivered an opinion with which Thompson, J., and Van Ness, J., concurred—to the effect—that "the penalty for which the suit was brought is imposed on individuals, acting *ministerially out of court*, and does not apply to the acts of a court done of record. "The Chancellor and judges may refuse such a writ, in their discretion, if applied for in term time, and the penalty will not attach. It is only when they refuse in a mere ministerial capacity, to allow the writ, that they are made responsible. The allowance of a writ in vacation, is not a judicial act." Per Kent, Ch. J., p. 295.

"Judicial exercise of power is imposed upon the courts. They *must* decide and act according to their judgment, and therefore the law will protect them. The Chancellor may possibly have erred in judgment, in calling an act a contempt which did not amount to one, and in regarding a discharge as null, when it was binding. This court may have erred in the same way; still it was but an error of judgment, for which neither the Chancellor nor the judges of this court, are or can be held responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice."^{*}

* But now by the *Rev. Stat.*, the courts authorized to give writs of *habeas corpus*, are expressly included in the penalty even when sitting and acting judicially, and can no more refuse to grant it than a judge out of court. 2 R. S. 566, 1st. Ed. § 31. "If any court or officer, authorized by the provisions of this article to grant writs of *habeas corpus* or *certiorari*, shall refuse to grant such writ *when legally applied for*, every member of such court who shall have assented to such refusal, and every such officer, shall severally forfeit to the party aggrieved, 1,000 dollars."

Spencer, J., delivered a brief opinion as follows: "The decision of the court at the last August term, in the matter of John V. N. Yates, entitles the defendant to judgment on the demurrer. A majority of this court held that the re-commitment of the plaintiff, after he had been set at large on *habeas corpus*, was a legal and justifiable act. I have not thought it necessary to examine the other point in this cause, with a view to deliver an opinion on it; but I have so far considered it, as to be unable to subscribe to several positions in the opinion just delivered; I must therefore be considered as giving no opinion on that point."

Judgment being thus given for the defendant, the plaintiff brought error.

The Court of Errors affirmed the judgment of the Supreme Court.

The opinion in favor of affirmance was delivered by Platt, senator, shortly after made a justice of the Supreme Court, and that for reversal by Clinton, senator.

Platt, S., says: "Before I proceed to examine the questions in the case, it is proper to notice a preliminary objection insisted on by the counsel for Mr. Yates. They contend that the door to those inquiries is now shut by the decision of this court, at its last session, in the case of *John V. N. Yates v. The People*.

"I can not admit the doctrine of *immutability* in the decisions of this court to the unqualified extent claimed by the plaintiff's counsel."

"The decisions of the courts are not *the law*; they are *only evidence of the law*. And this evidence is stronger or weaker according to the number and uniformity of adjudication, the unanimity or discretion of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. The weight and authority of judicial decisions depend also on the character and temper of the times in which they are pronounced. An adjudication at a moment when turbulent passions or revolutionary phrenzies prevail, deserves much less respect, than if it were made at a season more propitious to impartial inquiry, and calm deliberation."

He then contends that, as even in the Supreme Court,

where the judges confer together, and in the courts of Westminster Hall, the judges who silently acquiesce in the result, do not consider themselves bound to recognize as law all the *dicta* of the judge who delivers the opinion of the court; still less ought those *dicta* of a single member to bind the majority of that Court (of Errors,) who acquiesce in the *result* of such opinion.

Upon the question of committing by an *order* of the Court instead of a writ or warrant, he says :

"This suit is for the penalty for re-committing after a discharge on *habeas corpus* ; and the question is not as to the *mode*, but as to the *right* of re-committing. If the re-commitment was "*knowingly*, contrary to the statute," it is immaterial whether it was by *order* or by *attachment* ; for the defendant is equally liable in both cases."

"If that question were material in this case, it might be shown that *courts of record* may commit by *order* or by *writ* ; but a magistrate, not sitting as a court of record, can commit only by *warrant*, under his hand and seal. 2 Hale's P. C. 122 ; 2 Roll. Abr. 559, *Taylor v. Beal*.

On the point of the nullity of the *order*, in consequence of its stating an offence "*against the statute*," he says :

"A contempt is an offence *against the court*, as an organ of public justice, and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, or not. A conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment.

"I am of opinion that the order is clearly a conviction for a *contempt*, and in legal construction, nothing more. The words, "contrary to the statute, in wilful violation of his duty as master, and in contempt of the authority of this court," in the connection in which they stand, are mere *expletives*, showing a strong sense of the indignity offered to the court : but are not a substantive ground of conviction. If those words had been omitted, the conviction would have been complete ; and I think its legal import is the same *with or without* those words."

"It is contended that the attachment is illegal, being on

conviction without an examination or interrogatories. To this several answers may be given.

1. "It does not appear upon the attachment, whether it was so or not.

2. "If we recur to the conviction or order for the attachment, it appears that Mr. Yates refused to answer the complaint, "although regularly required so to do," and I think such refusal to answer, is not only a waiver of the right of being examined on interrogatories; but an admission that the complaint was well founded." (~~It~~ Quere. If he had not the right to decline answering, whether he had violated the statute?)

3. "The Chancellor had a right to dispense with such examination, if in his judgment, the proof by affidavits is sufficient in itself, and of such credit, that a denial by the party accused, under oath, would not countervail the affidavits. *King v. Vaughan*, Doug. 516; 4 Bl. Com. 284.

4. We are not now deliberating on an appeal from Chancery. We must confine ourselves to the writ of error. The only question is whether the Supreme Court is right; and we have no more power, in this suit, to examine the proceedings which led to the adjudication in Chancery, than the Supreme Court had."

"The last objection to the original commitment is, that it was "until the further order of the court," and therefore it is not definite and terminable, either by efflux of time or the doing of some act of the prisoner."

To this Senator Platt answers, "It is equivalent to saying as in common warrants, until he be delivered by due course of law." "It has been the established usage in all our courts, and in the English courts, distinctly traced back to the year books. But if it be wrong in itself, we have a right to apply the maxim, *communis error facit jus*."

"The next question is, whether Mr. Justice Spencer had a right to discharge Mr. Yates on *habeas corpus*, from his imprisonment under the attachment of the Court of Chancery."

"I can not perceive any difference between our *habeas corpus* act, and that of Great Britain, in relation to the point now before us. Whether a judge in vacation has any powers

under this statute, other than to bail persons committed for trial, or to keep the peace and answer indictments, is a question which perhaps need not be decided in this cause. There seems, however, strong ground to conclude, that his power "extends only to cases of commitment for such criminal charges as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner; all other causes of unjust imprisonment being left to the *habeas corpus* at common law;" which can only be issued in term, 3 Bl. Com. 137; 10 Mod. 429. It is, however, very clear from the express exceptions in the statute, that a judge *in vacation* has no right to discharge "persons convict, or in execution by legal process."

As to the right of the Chancellor to *re-commit*, he says: "I think Mr. Justice Spencer exceeded his jurisdiction in discharging Mr. Yates, and of course that discharge was unauthorized and void; the right of the Chancellor to re-commit, rests on the same footing as if Mr. Yates had been discharged on the order of any private citizen." "He was equally liable to re-commitment as if he had escaped from prison or been rescued by violence."

"But if I am mistaken in every position which I have laid down, there still remains this solemn and important question; is the defendant responsible in this action, for acts done by him officially and judicially, as Chancellor of the state?"

Sergeant Hawkins, (B. 1, C. 7, S. 6,) lays down this general rule, "that the law has freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in such courts as judges. The English authorities from the Year Books down to the present day establish and fortify this doctrine, that, where courts of special and limited jurisdiction exceed their rightful powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are liable to an action by the party injured. *Case of Marshalsea*, 10 Co. 68; *Terry v. Huntingdon*, Hardr. 480. But in the case of *Miller v. Seare*, 2 Bl. Rep. 1141, Lord Chief Justice De Grey said, "that the judges of the courts of general jurisdiction were not liable to answer personally for their errors in judgment. The protection to them is absolute and uni-

versal; with respect to the inferior courts it is only while they act within their jurisdiction."

"The 5th section of the *habeas corpus* act, gives a penalty against "*any person* who shall knowingly, contrary to this act, re-commit or imprison for the same offence, or pretended offence, any person so set at large."

"I consider this section as having no application to the *Chancellor* or *judges* in their judicial character. This penalty applies only to magistrates, and others who act *ministerially* as conservators of the peace, or who commit for trial, or to answer indictments."

"If the penalty for re-committing applies to the Chancellor while sitting as a Court of Chancery, it must equally apply to all the judges of the Supreme Court sitting together in term; and if the penalty be incurred by the Supreme Court composed of five judges, how are they to be sued, jointly or severally? If the judges or a majority of them are liable to be sued as a court, before what tribunal are they to be sued? If in the courts of Common Pleas, do the parties lose the benefit of a writ of error to the Supreme Court? Or are the judges to sit in judgment on themselves? The absurd consequences evince that, *as courts*, they were never intended to the party in a private suit. Consider them liable in their ministerial capacity only, and the construction of this statute accords with the established and revered principles of the common law."

"My opinion is, that the judgment of the Supreme Court ought to be affirmed."

"Paris, senator, concurred *with this opinion*; eleven other senators were also of opinion," says the reporter, "that the judgment of the Supreme Court ought to be *affirmed*, but did not state their reasons. For *aff.* 14, for *reversal* 5.

Clinton, senator, delivered an opinion in favor of reversal, in which he protests warmly against the Court of Errors, reviewing its own previous decision in *Yates v. The People*, and maintains that "when a decision has been pronounced here, the law is established, and no power could change it but the legislature," as he had maintained in the case of *Hartshorne v. Sleight*, 3 J. R. 562. After endeavoring to show that the decision in *Yates v. The People*, had settled

the question of the legality of the discharge and the illegality of the imprisonment and re-commitment, he says :

"But it is maintained that admitting the illegality of the imprisonment, yet the Chancellor acting as a court, is irresponsible, particularly to private prosecutions or indictments." This proposition he endeavors to overturn by a critique upon the decisions of Kent, Ch. J., and of the cases cited by him.

Lastly as to whether the Chancellor acted within his jurisdiction ; he maintains that the statutory inhibition as to re-commitment, after discharge on *habeas corpus*, extends to courts ; and that this case did not fall within one of the exceptions, as contended by the plaintiff in error.

Judgment was affirmed with *double costs* to the defendant in error.

The marginal note to this case, by the reporter, states as decided by the court, the following points :

1. "That the Chancellor was not liable to an action at the suit of the plaintiff for the penalty given by the 5th section of the *habeas corpus* act, for the re-commitment.

2. That a judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment.

3. That the commitment though specifying an offence "*contrary to the statute*, in such case," &c., and ordering him to be committed to jail until the further order of the court, was a legal commitment for a *contempt* ; the words "*contrary to the statute*," &c., being surplusage ; and that a judge of the Supreme Court, could not, on *habeas corpus*, discharge the person so committed from his imprisonment.

4. That the Court of Chancery may, in its discretion, commit for a contempt, on the affidavit of witnesses only, without first putting the party to answer on interrogatories.

5. That a commitment for an indefinite time, or "until the further order of the court," is good.

6. Whether a judge of the Supreme Court, in vacation, has any power, under the *habeas corpus* act, other than to bail persons committed for trial, or to keep the peace and answer indictments ? *Dubitatur*. He has no power

to discharge a person committed by order of the Court of Chancery, on a conviction for a contempt of that court; and if he so discharge him, the party may again, by an order of the Court of Chancery, reciting the original writ or attachment, be legally re-committed.

Semble. That the Supreme Court itself can not discharge in such a case.

✎ Although the *habeas corpus* act of the Rev. Stat. of 1830, has made important additions and amendments to the act of 1812, under which the foregoing suit was instituted, it is conceived that some of the principles and doctrines discussed and decided in *Yates v. The People*, and *Yates v. Lansing*, are applicable to many cases which may still arise both under the statute of 1830, in relation to "contempts," as well as under the *habeas corpus* act. See as to "contempts," 2 Rev. Stat. 207, 208, (1st Ed.,) § 10-15.

Also, as to the most material alterations in *habeas corpus* act, so far as relates to the foregoing cases, 2 Rev. Stat. 568, (1st Ed.) § 42, 59-61, most of the new provisions of which appear to be affirmative of the principles of the decision of the Court of Errors, in *Yates v. The People*; and expressly giving the action against the *members of the court* who should re-commit any person discharged on *habeas corpus*, except as provided for in § 61 of the act. Some of the difficulties suggested in the opinion of Senator Platt, would undoubtedly be encountered in such a suit against the judges of the Supreme Court, where all concurred in the re-commitment. Others of them appear to be quite unfounded.

HUSBAND AND WIFE.

JAKUES v. THE TRUSTEES OF THE METHODIST EPISCOPAL CHURCH. On appeal, 17 J. R. 548-598.

In Ch. 1 J. C. R. 450, 2 id. 543; 3 id. 77. In the Court of Chancery, the suit was, *Methodist Episcopal Church and others v. J. D. Jaques, R. Jaques, and H. Cruger.*

Marriage Settlement; Delivery of Deed containing it to Trustee; Accountability of Husband for the Separate Estate of the Wife, received by Him during Coverture; Expense of maintaining the Wife and Family during Coverture; Agreement of Wife that it shall be borne out of her Separate Property.

THE bill in this case, was filed by the trustees of the Methodist Episcopal Church, as legatees and devisees of one-third of the estate of Mary Jaques, deceased, late the wife of the defendant, J. D. Jaques. The bill stated that Mary Jaques, at the time of her intermarriage with the defendant, J. D. Jaques, was possessed of a large real and personal estate, &c.; that in contemplation of her marriage with him, a deed of marriage settlement dated 25th of September, 1805, was made and entered into between herself, of the first part, J. D. Jaques of the second part, and H. Cruger of the third part, by which the said Mary conveyed all her estate real and personal, to the defendant, Cruger, to the use of the said Mary, until the said marriage should take place; and from and after the marriage, to the use of such persons and for such estates as she, *with the concurrence of her intended husband, should, by deed attested by two witnesses, or by her last will and testament, limit and appoint; and until such appointment,* to the use of H. Cruger and his heirs during the life of the said Mary, to enable her to take the profits thereof, free from the control of her husband, and at *her absolute disposal*; and that immediately after the execution of the deed, the marriage took place between the parties. The bill then charged that the husband had possessed him-

self of her personal estate, and of the rents and profits of her real estate, &c. It also set forth that the wife, intending to execute the power reserved to her by the deed of settlement, did, with the concurrence of her husband, by deed dated the 12th of September, convey all her real estates to the defendant, Robert Jaques, in fee, upon *trust*; that after her decease he should sell the same, and should dispose of the proceeds after paying expenses, as follows: one-third to the plaintiffs, trustees of the Methodist Episcopal church; one-third to the plaintiffs, wife and children of T. B., in equal shares; and one-third to the husband. That after the execution of the deed, she, on the 25th of Sept. 1812, made her last will and testament, by which she gave several specific legacies to the plaintiffs, &c.; and all the residue of her estate she gave one-third to the plaintiffs, the trustees of the Methodist Episcopal church; one-third to the plaintiffs, children of T. B., &c., and one-third to her husband, and appointed P. H., T. B., and John D. Jaques, her husband, executors. The bill prayed an account of discovery of what moneys or securities belonging to Mary Jaques, at the time of her marriage, had come to the hands of the defendant J. D. Jaques, and how he had disposed of the same; also of the rents and profits of the real estate received by him; and that the title deeds might be brought into court; that a receiver be appointed, and for general relief, &c.

The defendants admitted, in their answers, and set forth the real and personal property of Mary Jaques, at the time of her marriage, &c. That the deed of settlement, of the 25th of September, 1805, was signed and sealed, but that it was never *delivered*, and therefore they denied its validity.

The case was brought to a hearing upon pleadings and proofs, and it being conceded that there must be a reference to a master to state an account between the parties; the Chancellor proceeded to settle the principles upon which the account was to be taken.

He said, in delivering his opinion, (1 J. C. R. 456, *et seq.*)

1. "I am of opinion, in the first place, that the marriage settlement of the 25th of September, 1805, is to be considered as valid and binding. It was executed by Mrs. Jaques, prior to the marriage, with the usual solemnities, and laid

upon the table, in the presence of all the parties to it. It was executed in reference to the marriage, which took place immediately thereafter; and while the deed so remained upon the table. The deed, under these circumstances, is to be considered as fully consummated. The husband, during the coverture, recognized the deed," &c.

2. "The deed of settlement being valid, and to be supported in this court, the defendant J. D. Jaques, is to account for the *whole personal estate* of his wife, which may have come to his possession. But, considering the confidential nature of the marriage connection, and the agency of the estate, which usually and almost necessarily results from it, it would be too rigorous to charge the husband with *interest* on the moneys which may from time to time, have been received."

3. "The defendant J. D. Jaques, is to account for all the rents and profits, which he may have received of her real estate, including the leasehold estate and the freehold purchased in by him under the operation of *Heyl's* mortgage. Those lands were purchased by him with the moneys of his wife, and the purchases consequently accrued to her benefit."

4. "*No allowances* are to be made to the defendant, J. D. Jaques, for the *maintenance of his wife and family, during the coverture*, that being a duty chargeable upon him as husband; and in no respect chargeable upon the *wife's separate estate*. I have not, therefore, paid any attention to the parol proof of the confessions of the wife during the coverture, as to any agreement that the family expenses were to be borne by her separate estate."

5. "It would be proper that the real estate left by Mrs. Jaques, including the lands so held in trust for her, should be sold, and the proceeds brought into court, to be distributed according to the directions in the deed and will of Mrs. Jaques." A decretal order was entered accordingly.

Upon the coming in of the master's report, the defendant took 14 exceptions, which are separately considered and disposed of by the Chancellor. So far as the principles of the decretal order made at the time of the reference are concerned, the opinion is in the main a mere application of them to the matters of the exceptions. 3 J. C. R. 77-120.

But upon the point, "how far the wife's estate was to be charged with the *family expenses*, by virtue of her general agreement to that effect; Chancellor Kent goes into a most elaborate review of all the English cases on the subject of the wife's acts and agreements in relation to the management and disposition of her separate estate. To that examination, we refer the reader who would trace the history of the subject, through the mazes of successive decisions; sometimes contradictory, often obscure, and seldom entirely satisfactory. It is no wonder, that Lord Eldon in *Parker v. White*, 11 Ves. Jun. 209, should say, that "it was extremely important that the power of the wife over her separate estate should be, once for all, well decided, and *that his mind was in great distraction on the subject.*" After the review of the cases, Chancellor Kent thus concludes. "I apprehend we may conclude (though I certainly do it with unfeigned diffidence, considering how great talents and learning, by a succession of distinguished men, have been exhausted on the subject,) that the English decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is *specially given*, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general, and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law." "There being, in the present case, a clear mode of *appointment* prescribed, it would be unjust and contrary to the settlement to set up any parol confession or agreement of the wife, as a title to her property. The exception is accordingly overruled." A decree having been entered in conformity with these decisions of the Chancellor, the defendants, J. D. Jaques, and Robert Jaques, appealed to the Court Errors. The respondents, also, filed a cross appeal.

In the Court of Errors, a preliminary question was raised, argued and decided, with respect to the review which the appellants proposed to take, of the several interlocutory orders and decrees, made in the progress of the cause, though made more than 15 days before the appeal was filed.

The court held, Spencer, Ch. J., delivering the opinion, that "an appeal from a final decree, opens for consideration all prior or *interlocutory* orders or decrees, any way connected with the *merits of the final decree*." The rest of the judges concurred, and by the unanimous opinion of the court, the appellant was allowed to proceed accordingly. After hearing on the merits :

Spencer, Ch. J., delivered an opinion in favor of *reversal*. He however held, upon the same general grounds of the Chancellor, that the deed of marriage settlement was entirely free from the objection taken to its validity on the ground of non-delivery. He says : "the possession of the deed by Mrs. Jaques, is not inconsistent with a delivery to Cruger ; for the possession of the deed by the *cestui que trust*, was in a legal view, the possession of the trustee, and after his repeated and solemn acts of recognition, the husband can not be heard to say the deed of settlement was not delivered." As to the power of the wife over her separate estate, he says :

"The question is whether Mrs. Jaques, with respect to her estate, is not to be regarded in a court of equity as a *feme sole*, and may not *dispose* of it as she pleases, without regard to her trustee ; there being nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition of the estate by her."

"I have examined this case with the unfeigned respect which I always feel for the learned Chancellor, who has denied the right of Mrs. Jaques to dispose of her estate, without the consent or concurrence of her trustee, and I am compelled to dissent from his opinion and conclusions. From the year 1740 to 1793, (with the single exception of the opinion of Lord Bathurst in *Hulme v. Tenant*, and in which case, a re-hearing was granted by Lord Thurlow, and the opinion reversed,) there is an unbroken current of decisions that a *feme covert*, with respect to her separate estate, is to be regarded, in a court of equity, as a *feme sole*, and may dispose of it without the consent or concurrence of her trustee, unless she is specially restrained by the deed or instrument under which she acquires her separate estate. There are nearly twenty cases decided by Lord Hardwicke and

Lord Thurlow, containing the principle I have stated, and which I shall not weary the patience of the court by citing.

"The mistake into which I think the Chancellor has fallen, consists in considering Mrs. Jaques, *restrained* from disposing of her estate in any other way than that mentioned in the deed of settlement." "It seems to me that the power reserved to Mrs. Jaques by the deed, has been misconceived; I understand it that during her life, her estate is to be at her absolute disposal, with a further power to grant and devise it by her last will and testament; but if the power of disposition, was specifically pointed out, it would not preclude the adoption of any other mode of disposition unless there were negative words restraining the exercise of the power, except in the very mode pointed out.

"It necessarily results from the power which I suppose Mrs. Jaques to have had over her property, that she might give it away, without any formal act, in the same manner as if she had been sole; and her agreement, that the family expenses were to be borne out of her estate, especially when executed by her, was a valid act. She was well situated as regards property, while her husband was in moderate circumstances. She chose, after her marriage, to maintain her former equipage, and her husband acquiesced in her wishes. It would be extremely hard and unjust, to throw upon him the charge of her establishment, when it is clear that she meant to defray the expenses of it herself. My opinion, accordingly is, that the agreement is valid, and that the husband is not only not to be *charged* with any sums of money expended for the maintenance of the family, but that he is to be *allowed* for all advances for that object, and also for moneys advanced for necessary reparations to her estate."

"The Chief Justice," says the reporter, "then examined the other points in the case; but as no legal principle was involved in the discussion of them, it is unnecessary to state the remainder of his observations."

With the foregoing opinion of Chief Justice Spencer, Platt, J., concurred in an opinion maintaining the same grounds, and a majority of the court concurring, (two senators only dissenting,) the decree was on those grounds *reversed*; and the court decreed that the decretal order of

Chancellor Kent, of the 27th of June, 1815, (1 J. C. R. 450,) be *so far reversed*, as that the husband should not be charged with the expenses of the family establishment, and should be allowed his advances therefor; and for reparations, &c.; and that the questions of *costs* in the Court of Chancery, and all further directions as to the final decree in the cause, be referred back to the Court of Chancery.

This case makes its appearance once more, in Hopkins' Rep. 453.

"This very litigated cause," as the reporter, Mr. Hopkins, justly styles it, came up again before Chancellor Sandford, upon 14 exceptions to the master's report upon the new adjustment of the accounts; "some of which," says the reporter, "were to matters of detail and of account; but others seemed to involve so much of principle, that it has been thought not unfit to continue, perhaps to conclude, the judicial history of this cause, by the decision of the exceptions."

The marginal note of the reporter seems fully sufficient to show the application made by Chancellor Sandford, of the principles of the decree of the Court of Errors; which we give accordingly.

1. The answer having stated in substance that the moneys received of R., were paid over by the defendant to his wife, but did not specify the amount, but which was proved by R. *Held*, that upon taking the account before a master, this allegation of the answer must be received as sufficient discharge of defendant, there being no opposite testimony. But in relation to other items, where the statements of the defendant's answer were *vague and general*, he was not allowed to discharge himself by such answer; the *receipt* of the money appearing by other testimony.

2. In this case, where the proceedings had been various and perplexed, and the accounts were intricate, though the complainants filed some exceptions, which were in effect repetitions of some others, yet as they tended to present the subject in a different point of view, the court would not disallow them as *repetitions* or as *argumentative*; and in the peculiar circumstances of this case, the court would not disallow an exception which was long and systematic, and so

framed as to present, in effect, the substance of such a report as the complainants contended ought to have been made.

3. By the decision in error, the defendant J. D. J., was to be allowed for the sums paid for the support of his wife for several years: the Chancellor held that though the burden of proof rests on the defendant, yet it must be reasonable proof, according to the circumstances of the case. Actual vouchers for such expenses are not to be required, much may be left to reasonable presumption; and general evidence of what must be the expenses of a family in like circumstances, may form to a great extent, the criterion."

The cause was re-committed to a master to state an account according to the decision on the exceptions, and the explanations with which they were, and the decree of the Court of Errors as the basis.

GARDNER *v.* GARDNER, 22 Wend. 526.

In Ch. 7 Paige, 112.

Husband and Wife; Wife's separate Estate, and her Liability as Executrix for Advances made by Husband on Account of such Estate.

THE decree of the Chancellor was reversed in this case as to a sum of \$2,000, borrowed by the wife of the husband for the benefit of her separate real estate. The husband dying and leaving the wife his executrix, the question arose whether she was liable for that sum to the creditors of the husband. The Chancellor held her separate estate liable, and that it was therefore chargeable with it, as a part of the assets of the testator.

On appeal, this decree was *reversed*, but as Cowen, J., says, in delivering the opinion of the Court of Errors, the case resolved itself into a *question of evidence*; viz., whether the husband had *forgiven* the wife this debt. It involved no question of law, except how far the wife after such a forgiveness of the debt, was liable to the creditors of the husband?

The Court of Errors held, that the husband had the legal

right to forgive this debt to the wife while he was living, and that the evidence established the fact that he had done so. That this discharged the *separate estate* of the wife from what would otherwise have been, if she had remained a debtor to her husband, a good charge upon it in favor of his creditors.

The Chancellor's decree was therefore *reversed* as to this point; he having held that although she was not personally bound, yet her separate estate was liable. *Reversed* accordingly, 23 to 9.

INCORPORATED JOINT STOCK COMPANY.

JENKINS, plaintiff in error, v. THE UNION TURNPIKE COMPANY.

1 C. C. E. 85. 1 C. N. Y. R. 381.

Liability of Subscriber upon Subscription to Stock; Amending Postea after General Verdict.

THE defendants in error were incorporated for the purpose of improving a certain road designated in their charter, and their capital was to be composed of 1,000 shares at \$25 each share. The act prescribed the form of subscription, and that at the time of subscribing, each subscriber should pay to the commissioners \$10 for each share. The plaintiff in error, defendant below, had subscribed for 280 shares, but at the period of writing his name, the \$10 per share were neither paid nor demanded. Two orders for paying \$5 on each share subscribed, were made, with which the plaintiff in error refused to comply, and for their amount the present two actions were brought. The first count was on the agreement, the second and third treated it as a *promissory note*.

General verdicts having been found for the plaintiffs, the defendant moved in arrest of judgment.

1. Because the first count did not set forth the payment of

the \$10 on each share, nor the other steps for choosing directors as prescribed, &c. 2. Because the second count did not set forth any good or valid consideration, but declared on the agreement, as on a note of hand ; which was not within the statute, &c.

The plaintiffs thereupon, upon an affidavit that the evidence was offered under and calculated in particular to support the first count in each declaration, (the second and third counts not being read to the jury, nor referred to by the counsel,) immediately gave notice of a motion to amend the verdicts in the several suits from the judge's notes, so as to make them apply only to the counts in the several declarations, and to enter verdicts for the defendant on the other counts, and to amend the *postea* and rules for judgment, in conformity to such order as the court might make.

The Supreme Court held, 1. That the president and directors of the company were legally authorized to make the calls, and that the contract of the defendant was broken by not paying, according to the order or call of the president and *directors* ; although payable by the terms of the subscription to the president, directors, and *company*.

2. That the interest acquired by subscribing for shares in the stock of an incorporated company, is a good consideration to support an action against the subscriber. But the promise to pay in such cases, as the president, directors, and company, may order, *before the corporation is organized*, is not such an instrument as will support an action, as for a *promissory note*. The payment was then uncertain and contingent, and the instrument must be declared on as a special agreement.

3. That where, as in this case, there are some good counts and some bad, and a general verdict on the whole ; if the *evidence* has been on the *good counts only*, the verdict may be amended from the judge's notes after notice of motion in arrest of judgment, on a cross motion to amend the verdict and *postea*, &c.

The motion to arrest the judgment was denied, and that for amendment granted, upon the *affidavit alone*. Kent, J., who tried the cause, saying the affidavit was correct, and

therefore he deemed it sufficient for the amendment, in which the court concurred.

Lewis, Ch. J., delivered an opinion in favor of arresting judgment; holding the *first* count defective, on the ground of want of consideration, as no *mutuality* existed until the payment of the \$10 per share had been paid; that the company might have *refused* the stock to the defendant, and that therefore he was not bound as a stockholder.

From this decision the defendant brought his writ of error.

The Court of Errors, Lansing, Chancellor, and L'Homme-dieu, senator, delivering opinions for reversal, reversed the judgment. The former says, "the commissioners were directed to exact from the persons who were to be admitted members of the corporation, both *subscription and payment*, as a condition precedent to their admission. If they omitted either to *subscribe* or to *pay*, they did not come within the terms of admission. It did not constitute a contract; for the contract, if any, was, "*I agree to pay \$25 for every share I acquire by this subscription,*" and if none were acquired, none were to be paid for.

"This result would render it unnecessary to examine the second point," (as to the sole remedy being by forfeiture of the stock,) but I shall cursorily remark, that if the subscription was efficient in the first instance, I have no doubt, but that the defendants might resort to their action as a cumulative remedy, and that they had their election either to sue or to exact the forfeiture prescribed by the act of incorporation. The contract if binding, would entitle the defendants in error to maintain their action. Therefore the plaintiff may either have his remedy by the common law or by the statute." L'Hommedieu, senator, argued that as the act gave no remedy but forfeiture of the shares, that forfeiture was the only thing the corporation could insist on. It does not appear that his opinion found any adherents.

The court *reversed* the judgment, holding that the action *under the circumstances of this subscription*, would not lie.

§ The foregoing case of *Jenkins v. The Union Turnpike Company*, came under the review of the Supreme

Court, in the case of the *Goshen Turnpike Company v. Hustin*, 9 J. R. 217. That was an action upon a *promissory note* for "\$125 for 5 shares of the stock of the corporation, payable in such manner and proportion, and at such time and place as the said plaintiffs should from time to time require."

There was a general demurrer to the declaration, and joinder in demurrer. The cause was submitted to the court, without argument. Upon these *pleadings*, it was decided by the Supreme Court, as follows: "The note set forth in the declaration is a good promissory note within the statute, though it has not the words "*bearer or order*," and may be declared on as such. The note was payable in money, and payable *absolutely*, and not upon any contingency. It was in effect payable on demand, and it was not requisite that a consideration should be averred, or appear upon the face of the note. There is, however, a consideration appearing on the face of the note in this case, for the promise to pay the \$125, was "for five shares of the capital stock of the corporation.

"But the question which the parties undoubtedly had principally in view, in this case, is, whether an action will lie at all on a promise by a turnpike stockholder to pay his instalments; and whether the remedy of a forfeiture of the shares and of all previous payments, be not the only remedy. The decision of the Court of Errors, by which the decision of this court, in the case of *The Union Turnpike Company v. Jenkins*, was reversed, may have given countenance to that opinion, but we apprehend upon a careful examination of that case, the reversal is to be placed upon other grounds, and that the reasoning and decision of this court, upon the principal point, remains good." The "principal point," here meant, is no doubt, that an *action would lie* if the subscription were valid. "In that case, the condition upon which Jenkins was to become a member of the company, viz., paying \$10, and the company was not understood to have been in *esse* at the time of the promise. It is to be presumed that the judgment of reversal went upon that ground; and that was the ground taken by the Chancellor, who was then the principal law member of that court."

In the case of the *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 238, the Supreme Court affirmed the principle of their decision, in the above case. That was also an action upon a *promissory note* for shares of the stock of company similar to that in Hustin's case, and a demurrer to the 2d and 3d counts of the declaration.

Thompson, Ch. J., in delivering the opinion of the court, says: "Since the decision of this court in the case of *Goshen Turnpike Company v. Hustin*, the question whether an action will lie at all upon a promise by a stockholder, in a corporation like the present, to pay his instalments, ought to be considered at rest, at least in this court. We then took occasion to notice the decision of the Court of Errors in the case of the *Union Turnpike Company v. Jenkins*, and concluded that although *one* of the members of the court, in delivering his opinion, thought that the only remedy was the forfeiture of the shares and all previous payments, yet, that was not the point on which the decision turned, but on the ground taken by the Chancellor, that the condition upon which Jenkins was to become a member of the company, viz., paying \$10, had not been performed, and that the corporation was not considered *in esse* at the time of making the promise by Jenkins."

It will be observed that these decisions of the Supreme Court, holding; that the promises to pay for shares, &c., in the two last cases, may be declared on as *promissory notes*, do not interfere with their contrary decision, on that point, in the case of *The Union Turnpike Company v. Jenkins*. That was based on the *contingency*, viz., the future organization of the company, which was attached to the promise in that case, vid. 1 Ca. Rep., opinion of Radcliffe, J., 391, 392.

See further, as to the liability of subscribers to the capital stock of incorporated joint stock companies, *Herkimer Man. and Hydraulic Company v. Small*, 21 Wend. 273; *Troy Turnpike and Railroad Company*, 21 id. 296, where the Supreme Court held that the remedy of the company was either by action or forfeiture, and in the former case that a forfeiture *after suit brought*, was no bar, but that the defendant was entitled to the benefit of the amount of the "*real*

cash value of his stock at the time it was forfeited, which should be deducted from the nominal amount, and the verdict be for the balance.

In another and later suit by the *Herkimer Man. and Hyd. Company v. Small*, 2 Hill, 127, which was an action to recover instalments upon a subscription to stock of the company: the defendant pleaded, that "by reason of his default in respect to *another* instalment, *all* the shares subscribed by him, had been declared forfeited by the company, after the suit brought, pursuant to a power contained in their charter, and that the stock forfeited was equal in value *to the amount claimed in this suit*," to which there was a demurrer.

The Supreme Court held, that the plea was defective in not averring, either an actual application or appropriation of the forfeited stock to the extinguishment of the instalments sued for; or that its cash value was equal to the whole amount of the defendant's subscription, and that a stockholder has no right to apply a forfeiture thus declared, to extinguish particular instalments.

Cowen, J., who delivered the opinion of the court, says: "We are not necessarily called upon to inquire whether such taking possession or sale after suit brought, would bar the action, short of a value covering costs as well as principal and interest. However there must be judgment for the plaintiffs, on the ground that the value of the stock is not averred to reach the whole debt and interest."

INDIAN GRANT.

JACKSON *ex dem.* SMITH *v.* GOODELL. In C. E. 20 Johns.
188.

In S. Ct. 15 id. 693.

Indian's Grant and Citizenship.

EJECTMENT. The Supreme Court held in this case that the Indian tribes of the state of New York were citizens, and might acquire real estate by purchase or descent, and alien and transmit it as natural born citizens, subject to legislative restrictions.

That therefore, the only son of an Indian who was a grantee of lands from the state for revolutionary services, might make a valid deed of them, there then being no law to restrain individual Indians from a disposition of their lands, acquired by an Indian, as an individual, distinct from his tribe, the conveyance having been made anterior to the act of 4 April, 1801, prohibiting such conveyances.

But the Court of Errors held, (Kent, Chancellor, delivering the opinion of the court,) 1. That the Indians within the state of New York were not even *quasi* citizens, but are distinct tribes or nations, permitted to live in the state, and under its protection.

2. That a patent of land to *J. S., an Oneida Indian, and to his heirs and assigns forever*, is to him and his *Indian heirs*, whatever their civil condition or character may be, whether aliens or citizens, and that such a patent is to be taken as issued by due authority, and as equivalent to a legislative grant to *J. S., and his Indian heirs*.

3. That a deed executed in 1797, by the son and heir of such an Indian patentee of land, to a citizen in the usual form, without the assent of the legislature, was illegal and void, before the act of 1801.

Judgment of *reversal*.

✚ S. P. in *Lee v. Glover*, 8 Cow. 189, where the deed

was held void, whether the Indian grantor reside with his tribe or not, if he reside in the state; and that, being *void*, no act of disaffirmance was necessary to render it invalid and unavailable to the grantee. Also held, that a patent from the people does not alter the rights or disabilities of the parties.

INDICTMENT.

LAMBERT v. THE PEOPLE, 9 Cow. 578.

In S. Ct. 7 Cow. 166.

Indictment; Conspiracy.

THE indictment for a *conspiracy* was, "that the defendants intending unlawfully, by indirect means, to cheat and defraud a certain incorporated company, (naming it,) and divers others unknown, of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons of their effects; and that in execution thereof, they did by certain undue, indirect, and unlawful means, unlawfully cheat and defraud the company and unknown persons, of divers effects."

The Supreme Court held that an indictment lay for such a conspiracy to defraud an individual of his property; and that the conspiracy might be alleged in those general terms as to a description of the offence, its object, and the persons concerned.

The Court of Errors were equally divided on the question whether this indictment was a valid one, and it was decided by the casting vote of the president, (Tallmadge,) that it was defective; and the judgment of the Supreme Court sustaining it, was *reversed*.

The Court of Errors held, that where an indictment for a conspiracy does not set forth the object specifically, and show

that such object is a legal crime ; it should particularly set forth the *means intended to be used by* the conspirators, and show that those means are criminal. Otherwise, the indictment charges no crime or offence of which the law can take notice.

§ The Rev. Stat. of 1830, (vol. 2, p. 691, 1st Ed.,) specify in what cases conspiracies are misdemeanors.

See *The People v. Eckford*, 7 Cow. 535.

THE PEOPLE v. HAYNES, 14 Wend. 546.

In S. Ct. 11 id. 557.

Indictment for obtaining Goods under False Pretences.

INDICTMENT under the statute for obtaining goods by *false pretences*. Five different false pretences were set out in the indictment, as the representations by means of which he obtained the goods ; each of which was negatived in the indictment. On the trial, it appeared from the evidence of one of the prosecutors, from whom the goods were obtained, that he had known the accused for about 18 months, and had sold him goods at three different times to the amount of \$1,500, previous to the purchase now in question, for which he had paid ; that the last credit for \$800 fell due and was punctually paid about three weeks before the 9th of November, 1833, when this sale took place. On that day Haynes selected the goods set forth in the indictment, which were packed in a box and sent on board the steamboat for Providence by his order, addressed to him on the outside, "Charles Haynes, Boston ;" and a receipt taken therefor from the agent or clerk, and which was brought back to the prosecutor, expressing that the box described in the receipt, was "to be transported in the said boat to Providence, and there to be delivered to Boston waggoners, or order, upon application on board of the said boat." The mate of the steamboat testified that when the boat arrives at Providence, they immediately deliver the goods to a Boston waggoner, who takes them to Boston, and there distributes them according to the

marks and addresses; they do not require the receipt or bill of lading to be surrendered before the delivery of the goods; they are delivered without asking for or requiring the receipt. The prosecutor however further testified that after the goods were sent on board of the steamboat, and on the same day, he learnt that Haynes had had a note protested, and determined to send the receipt to the steamboat and get the goods back. Before doing so, however, Haynes came into the store of the firm, and the prosecutor told him they could not deliver the goods, as they had heard that he had a note protested. Haynes denied this, and in answer to inquiries, said "that he was worth from nine to ten thousand dollars; that he was not embarrassed, and was able to pay all that he owed; that he had no endorser, and added that he had never endorsed but one note in his lifetime, and that was more than a year ago. The prosecutor then observed that if these representations were true, and H. would on his return, immediately send him a statement of his affairs, he would deliver the goods: and accordingly handed to him the receipt and invoice, and took his note therefor, amounting to \$657. The above were the representations set out and negatived in the indictment as the *false pretences*. Evidence was given to show that Haynes in December, after the purchase, had said to one of his creditors, "that if he did *know he was insolvent*, when he made the purchase, he was not bound to tell it; and admitted that he had been insolvent for one or two years, but for the last year had been growing much worse. His admissions to others that he was insolvent at the time, were also fully proved. The jury found the prisoner guilty, and the charge of the recorder having been excepted to, a bill of exceptions was tendered and signed; and the recorder having certified that there was so much doubt in the case as to render it expedient to take the judgment of the Supreme Court thereon, the District Attorney, pursuant to the provisions of the 2 R. S., 736, sued a certiorari, removing it to that court accordingly.

The opinion of the Supreme Court was delivered by Nelson, Ch. J., who states the following, as the only points material to be noticed.

1. Was the delivery of the property on board the steam-

boat Boston, *before the false pretences of the prisoner*, so complete in judgment of law, as to repel and disprove the allegation in the indictment, that it was delivered to him upon the faith of them?

2. Is it necessary to prove *all* the pretences laid in the indictment as having induced the delivery of the goods, and which are negatived, to be false, in order to authorize a conviction? And

3. Must the jury be satisfied that the pretences proved to be false, were the *sole* and *only* inducement to the credit or delivery?

As to the first, he says: "We entertain no doubt that C. A. and Co. (the vendors) had a right to resume the actual possession and control of the goods at the time they became alarmed about the credit of the prisoner, and held the interview with him in which he put forth the false pretences charged; and having asserted such a determination, the goods should be deemed in judgment of law, under their control at the time. The delivery was incomplete and conditional; the invoice had not been delivered, nor the security for the purchase money given, and the receipt from the master of the boat, or bill of lading, was still in their hands."

2. "The case of *The People v. Stone*, 9 Wend. 182, decides that it is necessary for the pleader, in drawing an indictment under this statute, to negative specifically, *all* the false pretences *relied on* to sustain the indictment and convict the accused. The same point had been before determined in the case of *The King v. Perrott*, 2 Maule and Selw. 379. Neither of these cases, however, decides, that it is indispensable to establish, by proof, the falsity of *each* pretence thus negatived; but are authorities, I think, for a contrary conclusion."

3. "From the view we entertain of the law on this point, the case was put to the jury by the court below more favorably to the prisoner than can be sustained. The recorder charged that if *some* of the pretences in the indictment were false, and the goods were obtained *solely by means of those pretences*, they, C. A. and Co., believing them to be true, the prisoner was guilty."

Now, we understand the rule to be, that if the pretences

proved to be false, had a *material effect* in procuring the credit or inducing the party defrauded to give up his property, it is sufficient. All the opinions in *The King v. Perrott*, concede this principle; for they suppose the pretences may be, what is most usually the fact, a mixture of truth and falsehood; and decide that the false pretences should be negatived; that the others, need not be; and that upon proof of the false ones, a conviction might or would follow. The position that the falsehood had a material effect upon the person defrauded, in procuring the property, necessarily implies that without it the object of the felon would have failed, he could not have obtained it; at least, we are disposed to require the false pretences to be so material, that without the existence of their influence upon the mind of the person defrauded, he would not have parted with the property; and if so, the effect is as injurious, and the offence as great, as if they had been the sole and only inducement in the case. In reason, therefore, as well as upon authority the offence would fall within the statute."

The court accordingly ordered the proceedings to be remitted to the court below, to the end that judgment be rendered against him according to the statute.

On a writ of error by the prisoner, from this decision of the Supreme Court,

The Court of Errors *reversed* the decision. The court held the delivery of the goods upon the facts of the case, to have been complete, and the property vested in the prisoner before he made the false pretences charged in the indictment; and as *that delivery* was not procured by the means set forth, the charge, as laid, was not proven. The Court declined to give any opinion as to the other points in the case. The Chancellor in his opinion in favor of reversal, says: "Although in point of moral turpitude, there is no essential difference between obtaining the possession of the goods by wilful and deliberate falsehood, in the first instance, and preventing the vendor by similar fraudulent and corrupt means from exercising a legal and equitable right, (of retaking his goods,) it would, I think be going too far in a prosecution for felony to say that the two cases are the same; and that the accused may be convicted of the latter offence, under an

indictment, charging him with obtaining the *delivery* of the goods by means of those false pretences."

➔ See *People v. Johnson*, 12 J. R. 292, where it was held, that if the *credit* be obtained by false pretences, the offence is complete within the statute.

THE PEOPLE v. WHITE, 24 Wend. 520.

Reported 22 Wend. 167.

Murder ; Indictment.

THE Supreme Court held upon a bill of exceptions, brought up on *certiorari* to obtain the advice of that court; that an indictment for murder at the common law, viz. ; charging the act to have been done with *malice aforethought*, is not vitiated by the addition of the words "*that the act was done from a premeditated design to effect the death of the deceased* ; such latter words may be rejected as surplusage.

They also held, that the fact that the judge in his charge to the jury in a criminal case, after alluding to the influence of proof of good character in a doubtful case, called the attention of the jury to the *want of such proof in the case before them*, is no cause for granting a new trial, where in other respects the charge is unexceptionable.

They also decided, which was not it seems reversed by the Court of Errors, that the associate judge of the Common Pleas of the city of New York, might hold a court of oyer and terminer in conjunction with two aldermen ; and that when the trial commenced with the Circuit Judge presiding, the associate judge and two aldermen ; and the Circuit Judge afterward left the court, and did not return, and the trial proceeded, the associate presiding, that it was not erroneous.

But a majority of the Court of Errors held that the charge in the indictment, that the crime was committed "*with a premeditated design to effect the death of the person killed,*" or *express malice* must be proved ; or the prisoner can not be convicted, although the act be also charged, as done "*with*

malice aforethought;" the allegation "with *premeditated design*," can not be rejected as surplusage.

2. That the judge's calling the attention of the jury to the *absence of proof of good character* was error, and the judgment of the Supreme Court was *reversed*, and a new trial ordered. 22 for reversal, one senator for affirmance.

INFANT.

WILBER v. GRACE, 10 J. R. 453.

In S. Ct. 10 J. R. 68.

Infant ; Militia Substitute.

WHERE an infant, under 18 years of age, and not liable to be enrolled in the militia, agreed, with the consent of his father, to go as a substitute for another, (who was drafted into actual service,) for a certain sum of money, which was paid, the Supreme Court held, that such contract was not binding on the infant.

The Court of Errors held, that such a contract was valid; and that if such substitute deserts the service of the United States, he may be lawfully arrested as a deserter; and that the officer commanding the arrest, or the person apprehending him, is not liable to an action. The judgment of the Supreme Court was accordingly *reversed*.

STAFFORD v. ROOF, 9 Cow. 626.

In S. Ct. 7 Cow. 179.

Sale of Chattels.

TROVER by an infant for a horse. The infant, having a general guardian sold a horse belonging to him, the infant; but there was no proof that he delivered the horse with his own hand. The vendee afterwards offered to sell the horse.

The Supreme Court held under these circumstances, that trover would not lie; that a sale and delivery of goods by an infant with his own hand though voidable, could not be avoided till the infant came of age. So of his sales of real estate. That the executory contracts of an infant, even by deed, are generally voidable, not void; and that though his executory contracts are voidable at any time without his restoring or being liable to restore the consideration, yet that it is otherwise as to contracts executed. On his coming of age, and on avoiding those, he must restore the consideration. But

The Court of Errors held that the action lay by the infant even before coming of age, without any demand of the horse from the vendee.

Judgment *reversed*, 13 to 7.

And per Jones, Chancellor. "The sale is void, no manual delivery by the infant, being shown. The sale and actual delivery of a personal chattel by an infant are voidable before he attains the age of twenty-one years. Otherwise of real estate."

MERCEIN v. THE PEOPLE, *ex rel.* JOHN A. BARRY, 25
Wend. 641.

Habeas Corpus ; Custody of Infant Daughter ; Res Judicata.

THE relator in this case, living separate from his wife, under a "voluntary but not final separation," as expressed in the articles of separation between them, obtained in May, 1839, a *habeas corpus, cum causa, &c.*, from the recorder of the city of New York, to the plaintiff in error, father of Mrs. Barry, to have the bodies of his daughter Ann Eliza Barry, (the wife,) and Mary M. Barry, the daughter of the relator, with the cause, &c. After hearing, the recorder discharged the *habeas corpus*, making an order that the child should remain in the custody of the mother, "until the relator and his wife, should make some arrangement or compromise, or until the custody of the child should be changed by a judicial decision." In June, the relator obtained a new *habeas corpus* from the Chancellor, to the same effect; and on hearing the parties, the Chancellor, August 26, 1839, made this order: "It appearing that so far as relates to the said Ann Eliza Barry, she is under no restraint whatever, but on the contrary, that she is now, and at all times has been, at perfect liberty to go wheresoever she pleased; and there appearing to exist no sufficient reason for depriving the said Ann of the care and nurture of her said infant child, Mary: It is therefore adjudged and declared that the said infant daughter, is not improperly detained or restrained of her liberty by the said Thomas R. Mercein, and that *no good reason now exists for taking the said infant child from its mother, and from the care and protection of the said Mercein.*" "And this court, therefore, will not make an order to take the said infant child from its mother, and the care and protection of the defendant M., for the purpose of delivering it up to the relator."

On the 29th of October following, the relator obtained a fresh *habeas corpus* from the Honorable William Inglis, one of the associate judges of the N. Y. Common Pleas, directed to the same defendant, and to the same effect. To this the

defendant returned the issuing of the writs by the recorder and the Chancellor, and the proceedings on each; and insisted that they were a bar to any proceedings on the present *habeas corpus*, and that the matter was *res adjudicata*, and the *habeas corpus* should be dismissed. The relator did not demur to the return, but objected to it as evasive; and Judge Inglis held, that "the adjudication was no bar to the issuing a new *habeas corpus*, and to the investigation of *new matters*, arising since the prior adjudication; and that the return should set forth that no *new state of facts had arisen between the parties in relation to the child*." The return having been amended accordingly, the judge after argument, decided that the proceedings before the Chancellor, and the order of August 26, made by him, were well pleaded in bar to any investigation of prior matters, in relation to the detention or imprisonment of the child; and that the matters in question between the parties up to the time of making that order, must be considered as *res judicata*. After an attempt by the relator, to offer evidence of *new facts*, which amounted to nothing, Judge Inglis dismissed the *habeas corpus*; declaring by the order, that "there was no *imprisonment or unlawful withholding of the child*."

The relator sued out a *certiorari*, and removed the proceedings to the Supreme Court. The judge returned all the proceedings before him, and also returned that "*the relator offered no testimony before him, except in relation to matters that had taken place, previously to the said two orders*."

The Supreme Court held, that "the order of the Chancellor was not conclusive, and not to be held as *res judicata*; and that from all that appeared in the papers, there was no good legal reason why the father was not entitled to the care and custody of his child, in preference to the mother;" and *reversed* the order of Judge Inglis. The respondent, M., then removed the record into the Court of Errors, by writ of error.

The Court of Errors, upon full argument, held:

1. That as a general rule the father is entitled to the custody of his *minor children*; but when the parents live apart under a *voluntary separation*, and the father has left an infant child in the custody of its mother, such custody will not be *transferred* to the father by the process of *habeas*

corpus, when the infant is of *tender age*, and of a *delicate and sickly habit*, peculiarly requiring a mother's care and attention; and especially will not an order for such transfer be made, where the qualifications of the father for the proper discharge of the parental office, are not equal to those of the mother.

2. An adjudication of a court of record, or of an officer, having authority to act in the matter, on the question of the *custody of an infant child*, brought up on *habeas corpus*, may be pleaded as *res adjudicata*, and is conclusive upon the same parties in all future controversies relating to the *same matter and upon the same state of facts*.

And the decision of the Supreme Court was *reversed* by a vote of 19 to 3, and a resolution adopted "that the decision of Judge Inglis, upon the question of *res adjudicata*, was in the opinion of the court, correct, and in conformity to law."

¶ Various questions were discussed, but not decided, which the reporter has noticed with *quæres?* as to each; among others, whether our Court of Chancery has power to restrain a father who is a *foreigner*, from removing from this state a child born here, the issue of a mother who is a citizen of this country, without her consent." All such questions remain for decision under the circumstances of the cases, as they may arise.

See, as to the discretion exercised by courts, in regard to infants, the case "*In the matter of Waldron*, 13 J. R. 418, where the Supreme Court held that though the court is bound *ex debito justitiæ*, to set the infant free from improper restraint; yet whether they shall direct the infant to be delivered over to any particular person, rests in their discretion, under the circumstances of the case; and that, although the person making the application be the father of the infant: and in that case, the court refused to direct the infant to be delivered to her father; she being under the protection of her grandfather, and it appearing that it would be more for the benefit of the infant to remain so, than with her father, and no improper restraint being shown.

MARITIME INSURANCE.

VOS and GRAVES v. THE UNITED INSURANCE COMPANY,
1 C. C. E. p. vii.

Breach of Warranty of Neutrality ; Sailing for Blockaded Port.

IN this case the Supreme Court held that the mere *sailing* of a vessel for a port understood to be blockaded, was a breach of neutrality, and of itself sufficient to avoid the policy.

BUT the Court of Errors *reversed* the judgment of the Supreme Court, holding that as by the law of nations, the mere *sailing* for a blockaded port, was not of itself just cause for condemning a neutral vessel and cargo, it was not such a breach of neutrality as to avoid a policy of insurance.

PH. URBIN DUGUET v. RHINELANDER and others, 1 C. C.
E. xxv.
2 J. C. 476.

Neutrality of Belligerent, Naturalized in Neutral Country.

THE Supreme Court held in this case, where the plaintiff, a subject of a belligerent power had emigrated to the United States, *flagrante bello*, and had become a naturalized citizen of this country, that a warranty of neutral ownership of the property, was not sustained by such letters of naturalization; at all events it was the duty of the assured under such circumstances to disclose to the underwriter the period of his *emigration*; his being, at that time, a subject of a belligerent power, it was held incapacitated him from acquiring the character and privileges of a neutral during the existence of hostilities, so as to bring the proper-

ty captured within the protection of neutrality. On writ of error,

The Court of Errors *reversed* this decision, and held that the emigration of a belligerent, *fugrante bello*, to a neutral country, did not render him incapable of being naturalized, so as to become a citizen of a neutral power; and that his naturalization vested him with the character of a neutral, to all intents, and that therefore the warrant of neutral property was fully supported by such a citizenship.

It was also held that the insured was not bound to disclose the period of his emigration to the underwriter.

JOHNSTON and WEIR v. LUDLOW, 2 J. C. 481; S. C. 1 C. C. E. xxix.

Not reported in S. Ct.

Contraband of War ; Illicit Trade.

THIS was an action on a policy of insurance, on goods from New York to Vera Cruz. The policy contained the following clause: "That the property be warranted by the assured, free from any charge, damage or loss, which may arise in consequence of a seizure or detention of the *goods hereby insured*, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." From the special verdict in the case, it appeared that the plaintiffs had shipped, *besides the property insured*, six blocks of tin, and 78 boxes of tin plates; that the latter were condemned as contraband of war by the British Court of admiralty, and the *goods insured* were condemned as property of British subjects, trading with an enemy to their mother country, Great Britain and Spain being then at war: but that the defendant knew when he insured the goods, that the plaintiffs were British subjects, and that the tin was on board. On this special verdict,

The Supreme Court gave judgment for the defendant, on the ground of the illicit trade, and that the above warranty of the assured, extended to a loss by "seizure and detention"

on account of a seizure and detention, *under pretext* of illicit trade or contraband of war.

The Court of Errors, however, held the contrary.

Three questions were made in that court.

1. Was the trade, in relation to the character of the plaintiffs, as subjects of Great Britain, an illicit trade?
2. Were the articles of *tin*, contraband of war?
3. Did the warranty of the assured extend in judgment of law to a loss by seizure or detention, merely because illicit or prohibited trade, or trade in contraband of war was *alleged*, when in fact the trade was not such?

The court held, 1. The domicile of the plaintiffs being established to be in New York, without any fraudulent motive, but for fair purposes of commerce, this court ought not to sanction the right of Great Britain to seize and confiscate their effects. (In support of this protection, derived from the domicile of the plaintiffs, the case of *Marryatt v. Wilson*, 1 Bos. and Pul. 430, was relied on. But in that case the party had been *naturalized* in the United States; a circumstance of which the Court of Errors take no notice, although Eyre, Chief Justice, in that case, relies mainly on that fact.)

2. The Court held that though *tin* might, under certain circumstances become contraband of war, yet that no case was made out in the sentence of condemnation, which would warrant that conclusion in the present case; and that the allowed effect of the sentence as *prima facie* evidence, was repelled by the very detail contained in it, of the precise grounds of condemnation.

3. That the expression "for and on account of any illicit or prohibited trade," &c., is not equivalent to or convertible into the words *under pretence of*, but may well be understood to mean "*for the cause of*," thus implying the *actual existence* of either illicit trade or contraband, to bring it within the terms of the warranty. For these reasons, they *reversed* the judgment of the Supreme Court.

CHURCH v. BEDIENT, 1 C. C. E. 21.

HALLETT v. PEYTON, id. 28.

Capture, Restoration, and Abandonment.

IN these two cases, the same point was presented to the court, viz., whether on a capture, and abandonment in consequence, to the underwriter, the fact of *restoration* of the property insured, though unknown at the time of abandonment takes away the right of the insured to abandon and claim for a total loss.

The Supreme Court held that he was so entitled immediately on the capture, although at the time of abandonment, the property had in fact been restored, the fact being unknown to the insured. On error

The Court of Errors held that the fact of restoration at the time of abandonment, though unknown, takes away the right to abandon and claim for a total loss; and that the assured under such circumstances, is only entitled to recover according to the final event, and the judgment of the Supreme Court was unanimously *reversed*.

SMITH v. WILLIAMS, 2 C. C. E. 110.

In S. Ct. 2 C. R. 19.

Insurable Interest in Vessel Bottomried for more than her Value.

ACTION on a policy of insurance. The question arose whether the insured, owner of a ship on which there had been taken up on bottomry more than her value, had an insurable interest in her.

The Supreme Court held that the owner had an insurable interest in the vessel to the extent of the sum *he paid for her*, although she was then bottomried to a larger amount; and, that as it did not appear that the assured knew of the lien upon her, at the time of effecting the insurance, he had a

right to a verdict for the value insured, deducting the price at which she sold.

B. Livingston, J., dissented from this decision of the Supreme Court, maintaining that the insurance was void, on account of the lien not being made known to the underwriter, as the risk was *materially varied*. On error,

The Court of Errors held that the policy was void, because the insured had no *insurable interest* in the ship; and the judgment of the Supreme Court was accordingly *reversed*.

VANDENHEUVEL v. THE UNITED INSURANCE COMPANY, 2
C. C. E. 217; 2 J. C. 127, 541.

Sentence of a Foreign Court of Admiralty.

IN error on a judgment of the Supreme Court, in an action on a policy of insurance on the *freight* of "the good *American* ship called the *Astrea*, at and from New York to *Corunna*," the freight valued at \$10,000, at a premium of fifteen per cent.

At the trial in the court below, the jury brought in a special verdict, stating among other things,

"That the policy was underwritten by the defendants in error, in consequence of a written application made to them by the plaintiff in error, in the words and figures following, to wit:

"New York, 14 Nov. 1798.

"Gentlemen, what will be the premium on the ship, freight, and cargo, of the *Astrea*, Captain Price, consisting in *mahogany, tobacco, slaves, dye wood, and sugar*, at and from New York to *Corunna*, to sail in eight days, property of the undersigned.

J. C. VANDENHEUVEL."

That the ship in the course of her voyage, was captured by a British frigate, and carried into Gibraltar, where she, with her cargo, was libelled in the Court of Vice Admiralty, and condemned as lawful prize to the captors, "as belonging

at the time of her capture to Spain, or to persons being subjects of the King of Spain, or inhabiting within the territories of the King of Spain, enemies of Great Britain." That the freight, by reason of this capture and condemnation, was totally lost to the plaintiffs in error, who duly abandoned the same to the defendants in error, exhibiting to them at the same time, due proof of loss and interest; that the freight was really the property of the plaintiff in error, and the ship and cargo were also his property, unless in judgment of law the plaintiff in error is concluded by the said sentence of condemnation; that the ship, at the time of capture was registered as an American vessel, and had all the papers which an American vessel usually has; that the plaintiff in error was born a subject of the United Netherlands, and continued such until the third of June, 1793, when he became a naturalized citizen of the United States according to law; and the defendants in error, at the time of subscribing the said policy of insurance, well knew that the plaintiff in error was born a Dutchman; that the sum due to the plaintiff in error, supposing him to be by law entitled to recover for a total loss, is \$4,365, and the sum due to the plaintiff in error, for return of premium, supposing him to be by law entitled to recover no more than a return of premium, is \$700. After stating these facts, the verdict submitted the following questions to the decision of the court.

1. Whether the plaintiff is by law entitled to recover the said sum, \$4,365, being the amount of a total loss?
2. If the plaintiff in error is not by law entitled to recover for a total loss, whether he is by law entitled to recover the \$700, being the amount of return of premium?
3. If the plaintiff is not by law entitled to recover a return of premium, whether he is by law entitled to recover any sum whatever?

On this special verdict, the Supreme Court, after argument, decided that the plaintiff was not entitled to recover as for a total loss, on the said policy of assurance, but that he was entitled to a return of premium, for which they gave judgment.

Benson, Kent and Radcliff, Js., delivered opinions, each holding, upon the strength of the previous decisions of their

own court, as well as upon the English cases, that the sentence of the Court of Admiralty was conclusive upon the insured, and that he could not recover beyond a return of premium. See 2 C. C. E. 219-266.

The plaintiff then brought his writ of error to the Court of Errors, where this question underwent elaborate argument, and the principle was finally established by the Court of dernier resort, that the sentence of a foreign Court of Admiralty, was not conclusive, but *prima facie* evidence only of the character of the property insured, although expressly condemned as enemy's property.

Clinton, (De Witt,) senator, and T. R. Gold, senator, delivered the only opinions, and arrived at the same conclusions. Senator Clinton says: "The plaintiff having warranted a ship and cargo as American property, the question is, whether in an action against the insurers, the sentence of a foreign Court of Admiralty, that such warranty was false, is conclusive evidence. It is admitted by the plaintiff, that the sentence binds and changes the property, and that it is *prima facie* evidence of the fact set up against him; and, on the other hand, it is conceded by the defendants, that in several cases, in an action of this kind, the judgment is not definitive in favor of the insurers; such as when, on the face of it, it is founded on local ordinances, or contrary to the law of nations; or so ambiguous that the court can not, from the reasons assigned, collect the grounds of it; and that this case not coming within either of these descriptions, the contest between the parties still remains open, whether the foreign sentence be *prima facie* or conclusive evidence against the insured, and whether it bind the property adjudicated only, or is conclusive to every extent, and in every modification of the subject."

He proceeds to examine the English cases, and maintains that *Hughes v. Cornelius*, 2 Shower, which was an action of *trover* for a ship sold under a decree of a French Admiralty Court, (in which the court admitted the sentence to be true, although contrary to the special verdict,) went only upon the ground of the decree's *changing the property*. "The idea that a sentence of a Court of Admiralty is conclusive, arises from this consideration; that the court always proceeds *in rem*. The

decree naturally and necessarily binds the subject of the proceeding. A ship or cargo, or any person purchasing under the decree, will of course be secure. The case of *Fernandes v. Da Costa*, he treats as one of no authority on the point, being a *nisi prius* case, and that all we can collect from it is, that the testimony adduced by the plaintiff, was not sufficient to balance that derived from adjudication." "In suits brought in England, upon foreign judgments, between the same parties, the courts consider them only as *prima facie* evidence of the demand, and admit the defendant on a plea of *nil debet*, to contest the original cause of action. If a foreign judgment be not considered conclusive between the same parties in cases of this nature, why of a foreign Court of Admiralty between third persons?"

Such being the opinion of a majority of the court, the judgment of the Supreme Court was *reversed* accordingly; and the cases of *Ludlow v. Dale*, 1 J. C. 16; *Goix v. Low*, 1 J. C. 341, were also overruled by this decision.

§ Notwithstanding the different decisions, as to the conclusiveness of the sentence of a foreign Court of Admiralty, in cases where the condemnation was *for breach of blockade*, as in *Croudson v. Leonard*, 4 Cranch, 434, and others in S. Ct. of U. S., yet in the case of the *Ocean Insurance Company v. Francis*, 2 Wend. 64, the Court of Errors held it settled law in our state, that the "sentence of a foreign Court of Admiralty, condemning a vessel warranted not to be employed in an *illicit trade*, was not enough to support the allegation of a *breach of warranty*; that, such foreign court acting as a municipal court to carry into effect the *navigation laws* of such foreign state, and condemning the vessel for a violation of them; to establish such a breach of the warranty, it was incumbent on the insurers to prove the existence of the laws alleged to be violated, as our courts can not judicially take notice of the *municipal* laws of other countries, but require them to be found as facts."

THE NEW YORK FIREMEN'S INSURANCE COMPANY v. WALDEN and WALDEN, 12 J. R. 513.

In S. Ct. 12 id. 128.

Barratry of Master ; Disclosure of Circumstances ; Materiality of, to the Risks Taken.

THIS was an action on a policy of insurance, on the ship Suffolk, from Belfast to Lisbon, and thence to New York.

The vessel sailed from New Orleans for Belfast, in September, 1810, but on the way thither was obliged to put into the Havanna for a supply of water. While there, the master drew a bill for \$800, on the plaintiffs below, which bill was not accepted or paid by them, for the reasons that they had had information from the captain that the vessel had put into the Havanna merely for water; and the bill was unaccompanied with any account or information of repairs or supplies furnished the vessel there. After a short stay at Havanna, the vessel resumed her voyage for Belfast, but by reason of damage sustained in tempestuous weather, was compelled to put into Cork, where she arrived on the 18th of January, 1811, and having undergone thorough repairs, left there on the 26th of April, and arrived at Belfast on the 3d of May.

A letter was written by the agents of the ship, at Belfast, to C. & Co., of Liverpool, the plaintiffs' agents, on the 19th of March, 1811, stating that "a vessel had got foul of the S., and carried away her bowsprit; that they feared the captain was careless of his business, and that his account of repairs and expenses would astonish them all; that his detention had been very great, yet he seemed very easy under it."

This letter and one accompanying it, of very similar purport from C. & Co. of Liverpool, were received by the plaintiffs before insurance was effected; but neither those nor the circumstance of the bill drawn at Havanna upon them, were communicated to the insurers.

The ship left Belfast on the 2d of July, with instructions to proceed to Lisbon, and from thence to New York. She arrived at Lisbon on the 14th of July, and having taken 80 moys of salt, for which the master gave a bill of lading to

deliver the same in New York, she left Lisbon on the 15th of August, after having cleared out for N. Y., and with verbal directions from the consignees at Lisbon, to proceed to New York.

The vessel, notwithstanding, was carried by the master to New Orleans: and after various suspicious acts, such as cutting away the cables close to the vessel, which had parted while she was at anchor, and a long and unnecessary detention at Matanzas, until the 29th of November, she finally arrived at New Orleans in December, 1811.

While at Matanzas, the captain hypothecated the vessel to one Drake, for \$1,563; but how the debts which were thus secured had arisen, or how the money raised by the bottomry had been appropriated, did not appear. He likewise obtained advances on the salt, and gave a bill of lading for it to be delivered to one Morgan, at New Orleans.

When the vessel arrived there, the agent of the plaintiffs below, by their direction, demanded of the captain to deliver up the ship to them, which he refused to do; and the agent then proceeded in the District Court of the United States, to dispossess him. The ship was libelled, and sold under an order of the court for the benefit of all parties. The salt was claimed by Morgan, who attached it, and also the ship; and by order of the court, the salt was appraised and bonded by the plaintiffs' agent.

The plaintiffs below, claimed to recover on the ground of barratry of the master; which barratry was in fact admitted on the argument in the Supreme Court. But the insurers contended that the insured were bound to communicate the information of the previous misconduct of the captain to them; as set forth in the letters of their correspondents, &c., and that not having done so, the suppression vitiated the policy.

But the judge, at the circuit, charged the jury, that the evidence of barratry was conclusive; and that "*the insured were not bound to communicate any of the letters, nor any of the circumstances within their knowledge, respecting the master of the ship.*"

The Supreme Court, on a motion for a new trial on the bill of exceptions in the case, held the charge of the judge

correct. Platt, J., in delivering the opinion of the court, says: "It would be unreasonably severe, and would defeat almost every policy of insurance against barratry, if the assured were held strictly bound to disclose every immoral act imputable to the master, and every unfavorable report which had reached their ears previous to signing the policy." "There must be some limit to this duty of making disclosures in such cases. It can not be necessary that the assured should give the underwriter a minute history of everything which they have known or heard touching the moral character of the intended master."

"If his general character be good, and the assured have no knowledge of any fact *impeaching the honesty* of the master, the charge of undue concealment has no legal foundation."

"In this case, the unfavorable opinions expressed in the letters of H. D. and H., (agents at Belfast,) and of C. & Co., respecting Captain Cartwright, were repelled by the evidence of his good character as a sailing master in New York, where he had long been known." Judgment was accordingly rendered for the plaintiffs below; whereupon the defendants brought their writ of error.

The Court of Errors *reversed* the judgment of the Supreme Court. The opinion of the court was delivered by Chancellor Kent. He says:

"The counsel went at large into the question, whether the assured were bound to communicate to the underwriters, at the time they applied for insurance, the letters and other knowledge they possessed of the improper conduct of the master. But it appears to me that this question is not for the decision of this court, because, whether the circumstances relative to the master ought to have been disclosed, depends upon the question, whether those circumstances were material to the risk; and the materiality is a question of fact for a jury, and not a question of law for the court. It is a well settled principle in the law of insurance, that what facts, in the knowledge of the assured, are material, and necessary to be communicated to the underwriter, when insurance is asked for, is for a jury to determine; and I will notice a few cases, in illustration of this point. My whole

opinion will rest upon the admission, and the solidity of this principle."

He then examines in this connection, the English cases of *Macdowal v. Fraser*, Doug. 260; *Shirley v. Wilkinson*, Doug. 306; *Willes v. Glover*, 4 B. and P. 14; and *Lyttledale v. Dixon*, 4 B. and P. 151; "where the Common Pleas," he says, "unanimously and very explicitly, declared their opinion that every material circumstance must be disclosed; but that it was for the jury to say, how far any given circumstance was material."

He next examines the American cases, and shows that *Livingston v. Delafield*, 1 J. R. 522; *Murgatroyd v. Crawford*, 3 Dallas, 491; adopt the same rule, adding, "And to conclude with the highest judicial authority in this country, the Supreme Court of the United States has decided, on two different occasions, *Livingston v. Maryland Insurance Company*, and *Maryland Insurance Company v. Rudens*, 6 Cranch, 274, 338; that the operation of any concealment on the policy, depends on its materiality to the risk, and that this materiality was a subject for the consideration of a jury, and must be left to them."

Some question having been raised on the argument, whether the language of the judge in this case, in his charge to the jury, was to be considered as a "positive direction in point of law, or mere advice on a matter of fact;" the Chancellor says, "The language of the learned judge was that "the plaintiffs were not *bound* or *required* to make the disclosure; that the matters offered in evidence were not *sufficient* to bar the action;" and nothing was said about the *weight of evidence* for the consideration of the jury. If even it was *doubtful*, by the bill of exceptions, whether the charge was intended as *direction* or otherwise, the result of my opinion would be the same; because, when the judge interposes his opinion to the jury on a point of fact, it ought not to be left in doubt in what light they are to receive his charge." "Every charge should distinguish clearly, between the law and the fact, so that the jury can not misunderstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact, for his direction in point of law."

"If then, the charge of the learned judge is to be considered, as I think it must be, as a declaration to the jury that the papers and facts not disclosed, were in *judgment of law*, immaterial, then the jury have never passed their own judgment upon the materiality of those proofs, and the cause ought to be remanded to another jury."

The judgment of the Supreme Court was accordingly *reversed*, and a *venire de novo* awarded.

For reversing 10, for *aff.* 8.

§ The Court of Errors held subsequently, in the case of the *American Insurance Company v. Dunham*, 15 Wend. 9, where a recovery was sought on the ground of a barratarious act of the master, and by the policy of insurance, the barratry of the master and mariners was insured against; that, notwithstanding the policy contained a warranty on the part of the assured against *illicit* or *prohibited* trade, and the vessel was condemned and lost in consequence of the master's *attempting an illicit trade by smuggling* a few articles in his possession, the underwriters were liable.

That such a warranty against illicit trade, is not broken, unless the illicit trade is carried on by the *assured* himself, or with his knowledge or assent; he is not otherwise affected by such acts of the master or mariners.

The judgment of the Supreme Court was accordingly *affirmed*.

See S. C. in S. Ct, 12 Wend. 463.

DOW v. WHETTEN and others, 8 Wend. 160-174.

Not reported in S. Ct.

Insurance ; Construction of Policy ; Usage.

ACTION on a policy of insurance effected on *goods out, and proceeds thereof home*. The *identical goods* composing the outward cargo, were brought back on the return voyage and lost.

On the trial of the cause, the plaintiff offered evidence to show by parol proof that by the known usage of trade, or by use and practice, as between assurers and assured, the word "proceeds," inserted in a policy, is understood to include the *identical goods*, if brought back on the return voyage. The evidence was rejected, and on bill of exceptions, and motion for a new trial,

The Supreme Court held that the *identical goods* were not included in the words "*proceeds home*," and that parol evidence was inadmissible to prove the usage or practice. On writ of error,

The Court of Errors held, that though the words "*proceeds home*," did not cover the identical goods, yet it was competent for the assured to show, by parol proof, that by the *usage of trade*, or by *use and practice*, as between *assurers* and *assured*, they were understood to include them. The judgment was accordingly *reversed*, and a *venire de novo* awarded, and the costs of reversing the judgment were ordered to abide the event of the cause; the court doubting whether such usage could be proved.

Judgment *reversed*, 17 to 5.

On the second trial of this cause, the plaintiff failed to establish the *usage*, and the defendants had a verdict in their favor.

SMITH v. BELL, 2 C. C. 152.

Overruling *Dupuy v. The United Insurance Company*, 3 J. C. 182.

Abandonment ; Total Technical Loss ; Deduction of One-Third New for Old, where Vessel, after being Stranded, and Damaged to more than Half her Value, was got off and Sold.

THIS was an action on a policy of insurance for \$14,000 on the ship *Mary Ann*, valued at \$14,000. The vessel was stranded on the coast of Scotland, and injured to an extent requiring \$7,221, to repair her damage. She was subse-

quently got off, taken into Greenock, and there sold, on account of whom it might concern. The plaintiff gave in evidence the sale of the vessel at Greenock; the purchase by the firm of A. Campbell and Co.; and her reparation at an expense exceeding half her value. The plaintiffs went for a *total technical loss*.

The defendant paid into court, \$5,100, contending that they were not liable for a total technical loss; and that as the amount of repairs was only \$7,221, and they were entitled to a deduction of one-third, *new for old*, they were chargeable with \$4,884 only; which was less than one half of the value of the vessel, as valued in the policy.

The Supreme Court held, upon the authority of the case of *Dupuy v. The United Ins. Co.* 3 J. C. 182, that where the repairs are equal to *half the value* and more, the *insured* have a right to abandon *without reference to the deduction of one-third new for old*; and that the deduction applied only to cases of partial loss.

The defendants brought their writ of error, on this judgment, and

The Court of Errors *reversed* the judgment of the Supreme Court.

Per Curiam, delivered by Lansing, Chancellor. "On this case, only two questions are presented for the consideration of the court; 1st, whether on a policy of insurance, on the estimate of repairs of a vessel, injured by any of the perils insured against, new materials substituted for the old, do not entitle the insurer to an allowance? And if so, 2nd, at *what period* is the allowance to be admitted?

"These questions are open here. They must, in a great measure, depend upon general reasoning, drawn from the nature of the contract of insurance, and that reasoning may be comprised within very narrow limits."

"In the case of *Da Costa v. Newnham*, 2 T. R. 407-415, determined in the British Court of King's Bench, since the revolution, the usage which obtained with respect to the repairs of allowing one-third, new for old, seems to have been acknowledged; and it is now urged in argument, that at any rate, whether or not the defendant was entitled to this allowance, 'was a question for the jury, as it depended upon

usage. Buller, J., speaks of it as a "usual allowance," and Ashhurst, J., observes, that the allowance of one-third of the repairs, *is the rule*, where the ship is repaired and delivered over again to the owner for his benefit. That case arose *on a technical total loss*, which the insured did not avail himself of, by abandoning. The recovery was for an average loss of upward of 80 *per cent.* The ship had been repaired at the instance of the underwriters. They refusing to pay for the repairs, a *bottomry* bond was executed on the vessel, in consequence of which she was sold to satisfy the debt."

"It was contended that the value of one-third of the repairs ought to be deducted, and the answer to this, which appears to me conclusive, was, that the repairs, having added to the value of the vessel, must have been compensated for, in the sale on the bottomry bond; and as the owners never had the ship, so they could not be the better for the repairs."

"The rule that constitutes the loss of more than one-half the value of the subject insured, a total loss, is a positive one, originating in the convenience of having a determinate and precise test in all cases."

"From the nature of the contract of insurance, I think the allowance for replacing the old material with the new, is reasonable and proper, and if so, that as the deduction is professedly made on the principle that the value of the subject insured, has been enhanced to that amount, that deduction ought to be made, *before the test of total technical loss* is applied; for the doctrine of total technical loss or not, is expressly founded on the position that the subject has been deteriorated more than one half."

"I am therefore of opinion that the judgment of the Supreme Court should be *reversed*."

The majority of the court concurred in the *reversal*.

✍ In this case, an *abandonment* is not *expressly* stated, though the vessel was sold at Greenock, by the master, for benefit of whom it might concern. The plaintiff's proofs, as stated by the reporter, and all the circumstances of the case, show that it must have been an abandonment, as it was a *sale of necessity*, without repairs, the vessel having been stranded, and the voyage broken up; in addition to the

heavy amount of damage actually sustained by the vessel herself. "The plaintiffs gave in evidence," the report says, "a subsequent sale of the vessel at Greenock, *on account of those who might be concerned*; the purchase by the firm of A. Campbell & Co.; and her reparation at an expense exceeding half her value." "The plaintiffs went for a total loss."

By what logic, under these circumstances, the Chancellor arrived at his conclusion, that the judgment of the Supreme Court as to the deduction of one-third new for old, ought to be reversed, while professedly acknowledging the correctness of the decision in *Da Costa v. Newnham*, although it *was* "decided before the revolution," it is impossible by anything in his opinion to discover. He says of that case, "It was contended that one-third of the repairs ought to be deducted; and the answer to this, which appears to me *conclusive*, was, that the repairs having added to the value of the vessel, must have been compensated for, in the sale on the bottomry bond; and as the owners never had the ship, so they could not be the better for her repairs."

Now, from this language of the Chancellor, *who*, would it be imagined, had made this *answer* to the claim of the underwriters for the deduction of one-third new for old? Why surely, the court; or, at least, the counsel for the *assured*? For who else could make an *answer* to the *underwriters' claim*? And yet, we find this "*answer*" to their claim, which Chancellor Lansing finds so "*conclusive*," comes from the mouths of their own counsel! It was actually urged by Bearcroft and Law, counsel for the underwriters, (See 2 T. R. 411,) as a reason *for making the deduction*! So absurd was it, that neither Buller, J., nor Ashhurst, J., as we shall presently see, deemed it worthy the least notice. Bearcroft and Law are reported as arguing as follows: "The underwriters are also entitled to allowances which have not been made to them. The principal of these, is the allowance of one-third *new for old*. The usage in that case has been truly stated to be founded on the advantage derived to the owner. To which it is objected *here*, that the owner did not retain possession of the ship, and therefore did not reap any such advantage. *But still, he has had the benefit of them, if the ship sold*

for more on account of these repairs, which it must have done." p. 411.

And this "*conclusive answer*," to their *own claim*, comes from the counsel of the underwriters! Is it possible, that a more glaring absurdity could be put forward, than this misapprehension of Chancellor Lansing?

And yet this case of *Smith v. Bell*, so reasoned and so decided, laid the foundation—was in fact, the sole foundation in our courts in New York, for the obviously anomalous and arbitrary rule, that the deduction of one-third new for old, should be applied in *all cases of total technical loss*, (for to that point it has now come!) to determine the right of abandonment and recovery; whether the vessel had been, or even *could be* repaired or not. Upon so frail and sandy a basis, rests a doctrine which a later Chancellor, (Walworth,) announces authoritatively as a part of the fixed and settled law of the land. In the case of *Dickey v. The American Insurance Company*, 3 Wend. 658, that learned judge took occasion to say: "It is a well settled rule of *American Insurance* law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state, and render her seaworthy, will exceed *three-fourths* of her value, before the disaster, the owner is not bound to repair, but may abandon, as for a total loss. This is usually called, he adds, a loss to more than half her value, because one-third of the expense of repairs is deducted, new for old." We shall examine when we come to the succeeding case of *Ogden v. The Am. Ins. Co.*, *post*, 263, on what this positive *dictum* of the Chancellor *then* rested, being as it was, *obiter* and *extra causam* in that case; and we shall also inquire whence that *dictum* has since derived its chief, if not its only countenance and support.

At present let us return, (for our analysis of it, is by no means completed,) to the case of *Smith v. Bell*. We have already shown in what light Chancellor Lansing's "*conclusive answer*" to *Da Costa v. Newnham*, is to be viewed. Let us now look at the facts of the case a little more closely, to see on what ground the decision of the Court of King's Bench was placed. Buller, J., reported the facts as follows:

"The amount of the bottomry bond, together with the

interest due, was £678, and the ship sold for 600 guineas;" p. 408. That is, less than the lien for repairs by about £50. Here, then, we see that neither the *owner* or the *underwriters* had any *benefit* from the repairs, as the ship did not bring enough to pay their amount.

"Under these circumstances," the report says: "Buller, J., stated that it had *been agreed at the trial* and he had so stated it to the jury, that there had not been a total loss at *Nice*; for though the plaintiff had offered and was entitled to abandon, yet in truth he had not abandoned. Then considering it only as an *average* loss, the question was, whether the underwriters should be liable for the full amount of the insurance? The bottomry bond was only £600, but the ship never came free into the plaintiffs' hands; for in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold. He thought that as all the subsequent injury had accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damnified to the *whole amount of the insurance*, the underwriters were liable. Then the only remaining question was, how should the *average* be calculated?" As to that, he said four or five different methods had been delivered in to him, and were then in court; one of these was a paper delivered by the defendant, which he should at once lay out of the question: for in that, one-third of the sum charged for repairs was taken off, which was the usual sum allowed in respect of *new work* for old. Now this was never allowed unless the ship got into the possession of the owner again, so that he got her, the better for the repairs. Therefore that rule did not apply in that case." 2 T. R. p. 408.

This was the case as reported by Mr. J. Buller, to the Court of King's Bench; the questions stated by him, and passed upon with regard to the adjustment of the *average* upon the freight, &c., are foreign to the question under consideration. Let us see from his opinion and that of Ashhurst, J., who also delivered one, whether there is any departure from the above ground.

Ashhurst, J., says, p. 412. "The plaintiff had declared that he would not advance any money; and therefore the captain was obliged to raise money on hypothecation. The

ship was put in the best repair she was capable of, and on her arrival in London, the bond was tendered for payment to the underwriters, but they refused to discharge it ; in consequence of which the ship was obliged to be sold ; and that put the owner in the same situation as if he had originally abandoned at Nice, and made it a total loss. And now the underwriters contend that they are entitled to the allowance of one-third for the repairs. That indeed is the rule, where the ship is repaired and delivered over to the owner again for his benefit ; in such case, it is right that such an allowance should be made upon the ground which has been stated that the owner is put in a better situation than he was before, by having new work for old. But here, as the plaintiff *never has been put into the free possession again* of the ship, and that through the default of the underwriters, he can not be said to have had any benefit from the repairs, and therefore he is not bound to make that allowance."

Buller, J., says: "On the evidence I have no difficulty in giving it as my opinion, that the repairs were undertaken at the risk of the underwriters, and that they were answerable for all subsequent losses. The ship was repaired, by raising money on a bottomry bond. The ship never was in the free possession of the plaintiff from that time ; she came home subject to that *onus*. If the underwriter had discharged it, and thereby restored the vessel to the owners, they might then have demanded the usual allowance of one-third new for old. But they refused to do so ; in consequence of which the ship was obliged to be sold ; and therefore by their neglect, there has been a total loss to the plaintiff."

We believe the learned reader will have found the requisite materials before him, at present, for forming a proper estimate of the respect originally due to the case of *Smith v. Bell*, as an *authority*. In a note to the next case, we shall endeavor to ascertain how much additional credit it has become entitled to, from its advanced age ; if that can be made to relieve its original infirmities ; and how much it has been improved by the subsequent judicial endorsements which are relied on to make it a settled integral part of "American insurance law."

THE AMERICAN INSURANCE COMPANY v. OGDEN and
MACOMB, 20 Wend. 287-322.

In S. Ct. 15 id. 535.

*Sea Worthiness ; Abandonment for Total Technical Loss ;
Deduction of One-Third New for Old.*

THIS was an action on a policy of insurance originally brought by Ogden and Macomb, in the New York Superior Court, against the defendants, as underwriters on three-fourths of a schooner, in the names of Ogden and Macomb, as the *agents of the owner*, loss payable to them. The policy was for six months from the 17th of November, 1829; sum insured, \$1,800. The vessel sailed on the 26th of November, on a voyage from New York to Charleston, thence to Norfolk, and thence to St. Thomas in the West Indies. While going into Charleston harbor, and while the vessel was in charge of a pilot, the *small bower anchor* was lost on the outward bar. The schooner did not go up to the city; but discharged her cargo, which consisted of stone, about a mile and a half from the city. The vessel remained five or six days in the harbor; the pilot engaged to get up the anchor but did not; and the wind being fair, the schooner sailed for Norfolk, where she arrived in safety. On her arrival there, the master made inquiries for an anchor, but could not procure one of a suitable size; those he saw, were too heavy or too light. He remained there nine or ten days, took in a cargo of shingles, and sailed for St. Thomas, on the 7th of January. Three days afterward, the schooner sprung a leak in consequence of a heavy cross sea, and in three days more she encountered a heavy gale, with a heavy sea; her sails were split, and her mainmast sprung, and she became very leaky. She, however, succeeded in reaching St. Thomas, on the 25th of January. The master, after making inquiries of mechanics, made an estimate that the vessel could not be repaired and rendered sea worthy for less than \$1,700. The cargo was discharged, and a survey was taken of the vessel by three surveyors, appointed by the U. S. consul, who reported that the repairs might be made for \$800 or \$900. The master was wholly destitute of funds; the con-

signees of the cargo refused to make advances, the *freight* having been previously drawn for, and they holding a protested draft for the same; and money could not be obtained on *bottomry*, although the master attempted to raise money in that way for the purpose of making repairs. Under these circumstances, the vessel was sold at auction and brought only the sum of \$388. The plaintiffs abandoned as for a total loss. The insurance company offered to pay the loss, as estimated by the surveyors at St. Thomas; which offer the plaintiffs refused, and brought their suit.

On the trial in the New York Superior Court, the defendants requested the judge to charge the jury, 1. That St. Thomas being the *port of destination*, the inability of the master to procure there, the necessary funds for repairing the vessel, was not a sufficient ground of abandonment. 2. That the policy being *on time*, the warranty of seaworthiness attached as a condition precedent at the commencement of each voyage, during the period which it covered, and that it being admitted that the vessel was unseaworthy, from the want of an anchor, when she left Charleston, and also when she left Norfolk, the defendants were discharged from all subsequent perils; or, if the judge was of a different opinion, that then he should charge that the evidence was not sufficient to excuse the *laches* of the master, in not recovering the anchor, or obtaining a new one at Charleston, and that therefore the defendants were discharged from all subsequent liability; and 3. That if the judge should be of opinion the *laches* of the master at Charleston was sufficiently excused, then that he should charge the jury that it was the duty of the master after his arrival at Norfolk, if an anchor could not be there obtained, to procure one from a neighboring port; and if the jury should be of opinion that by sending to Baltimore or New York, or any other neighboring port, the master could have obtained one without unreasonable delay of the voyage, then that the defendants were entitled to their verdict. The judge charged the jury that the inability of the master to procure the necessary funds at St. Thomas was a valid cause of abandonment; and further instructed them that the vessel continued to be covered by the policy during the

voyage, and that the plaintiffs were entitled to recover, if the negligence and laches imputed to the master were sufficiently excused, and that the material question of fact on that point was, whether the master made use of due diligence at Norfolk to obtain an anchor. The defendants excepted to the charge. Verdict for the plaintiffs for \$2,161; on which judgment having been rendered, the defendants brought error to the Supreme Court.

A majority of that court, Savage, Ch. J., and Nelson, J., (Bronson, J., dissenting,) held, Savage, Ch. J., delivering the opinion :

1. "That the seaworthiness, implied in a policy of insurance, related only to the commencement of the risk; if then broken, the insurer was discharged; but that a breach of this warranty after the risk has begun, does not discharge the insuree, *unless the loss be the consequence of such unseaworthiness.*"

2. "That it is not necessary that the injury to a vessel by the perils insured against, should, *in all cases*, exceed *one-half the value* to justify an abandonment as for a total loss; the inability of the master to procure the necessary funds to make repairs, is a valid cause of abandonment, although the vessel be in the *port of destination*, and not an intermediate one, or one of necessity."

After disposing of the question of seaworthiness, as above stated, Ch. Savage says: "The next point urged in behalf of the insurers is, that the want of funds wherewith to make repairs is not a good ground of abandonment." "The right is as perfect, under the construction which has long been given to policies of insurance, to recover for a *technical total loss*, as for an *actual total loss*, or a partial loss. In the case of *Peele v. The Merchant's Ins. Co.*, 3 Mason 65, Mr. Justice Story after a very elaborate review of most, if not all the cases on this point, comes to the conclusion that the right of abandonment exists, in the five cases, which he enumerates, the fifth and last of which is "Where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value." He further remarks: "If there be any general principle that pervades and governs them, it seems to be this; that the

right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost." The conclusion here drawn from the case, has received the approbation of Chancellor Kent. In his commentaries, 3 Kent, 322, he says: "The conclusion is, that the right of abandonment is to be judged of by all the circumstances of each particular case, and that there is *no general rule*; that the injury to the ship by the perils insured against, must, in all cases, exceed the one-half her value, to justify an abandonment." The case of the *Patapsco Ins. Co. v. Southgate and others*, 5 Peters R., 604, exemplifies this principle. The opinion of the court was delivered by Thompson, J. He states that the court below had instructed the jury that if the vessel could not have been repaired without an expenditure *exceeding half her value at the port of Carthagena, after such repairs*, it constituted a total loss. "This direction," says the learned judge (Thompson,) "we certainly think correct."

Ch. J. Savage continues:

"In the case under consideration, the defendants below raised no question of fact for the jury upon the *bona fides* or *discretion* of the master." "This presents the point whether the *inability to repair the vessel*, which must be admitted to have been a real inability, was a good cause of abandonment. These facts conceded, it seems to me to come precisely within the case of *The Patapsco Ins. Co. v. Southgate*, where a sale of the ship had become necessary for the interest of all concerned."

"In this case, the master had all the means of acquiring credit which the control of the ship gave him, which in this action I think is sufficient."

Bronson, J., dissented, on the ground that the want of funds in the port of *destination*, was not of *itself*, a suffi-

cient ground of abandonment, and under the circumstances, was the fault of the assured.

From this decision the defendants brought error.

In the Court of Errors, Walworth, Chancellor, and Verplanck and Wager, Senators, delivered opinions in which they fully concur with the decision of the Supreme Court on the point of *seaworthiness*. The Chancellor thus concludes his remarks on that part of the case: "And in the recent case of *Hollingsworth v. Broderick*, 1 London Jurist, p. 430, in an action upon a *time* policy by the assured against the underwriter, the defendant pleaded in bar to the action, that subsequently to the policy and before the loss, the ship became broken, damaged, and unseaworthy; and that by care and diligence, and with little expense, she could have been rendered seaworthy; but that the assured neglected to make such repairs, by reason whereof she remained unseaworthy until the time of the loss. Upon demurrer to this plea, Lord Denman and the other judges of the court of Queen's Bench held, that "the plea formed no defence to the action, as it was not averred that the vessel was lost *in consequence of such unseaworthiness*; and that the implied warranty only applies to the commencement of the risk." I am satisfied, therefore, in the present case, that the assured were entitled to recover for the subsequent damages to the vessel, although she had been previously rendered unseaworthy by the loss of the small bower anchor, and continued so up to the time of the disaster, upon her passage from Norfolk to St. Thomas. It only remains to consider whether the underwriters were liable for a *total*, or only for a *partial loss*."

On that point he thus proceeds: "The insurance by this company was upon three-fourths of the vessel only, and valued at \$1800; the whole vessel was therefore valued at \$2400. And if this is, for the purposes of the policy, to be taken as her real value in ascertaining whether she could have been repaired for less than one half her value, deducting one-third new for old, then there is no pretence that the assured had a right to abandon on that account, as the very highest estimate of repairing at St. Thomas was but \$1700. That sum after deducting one-third new for old, would leave the cost of repairs but \$1133,33, or less than half the value as stipulated in the policy." (See note 23 at the end of this

case as to this calculation and the obligation of the owners or assured as to repairs in a port of destination.)

As to the deduction of one-third new for old, he says: "I am aware that in the case of *Peele v. The Merchant's Ins. Co.*, 3 Mason's Rep. 27, Judge Story, whose opinion is entitled to great weight upon a question of insurance, held, that, the value of the vessel, as agreed upon by the parties and inserted in the policy, was not to be taken as the *true value*, in determining whether the repairs would exceed half her value, in reference to the question of abandonment. He also decided in that case, that in determining the same question, the deduction of one-third new for old, from the estimated repairs, was not to be made."

From these two opinions of Judge Story, notwithstanding "the great weight his opinion is entitled to," the Chancellor avows himself a dissentient. He says: "In the *first* insurance cause* which came before me as a circuit judge, I followed his decision as to the first point, but not as to the last; although I had, at the time, some doubts as to the correctness of his decision upon both points. It now appears that the Supreme Court of Massachusetts has expressly overruled his decision in that case, not only as to the deduction of one-third new for old, so as to settle that question in conformity with the reported decisions of the courts in this state, but also as to the conclusiveness of the valuation in the policy; in which decision of the state court I most fully concur. Upon this last question, it appears to be impossible to add to the strong and conclusive reasoning of Putnam, J., in the case of *Debtors v. The Ocean Ins. Co.*, 16 Pick. 312." (After giving a page of this reasoning,) the Chancellor adds: "To what has been so well said on this subject by another, I will merely add, that by adhering to the valuation in the policy, much litigation will be prevented, which is generally a serious injury to the assured."

The Chancellor, p. 300, further says in regard to the rule of allowing the assured to abandon when the vessel has been

* *American Insurance Co. v. Center*, 4 Wend. 45, where the Chancellor relates the same thing and sets up the same opinions; though that case turned on different questions.

damaged to more than half her value : "The rule of permitting the assured to abandon when the vessel has been injured to more than half the value, does not exist in England. It was first adopted in this country from a similar rule in relation to an insurance upon the cargo, in some of the other maritime countries of Europe ; and among others in France, according to Pothier ; and it is now adopted as a part of the maritime law of France, in terms, by the more recent commercial code of Napoleon ; except that the new code requires that the loss should be at least three-quarters of the value of the property assured, to authorize an abandonment on that account. Code du Commerce, art. 369. He says : "The courts of this country should be careful how they depart from the established rule, or they will find the underwriters and the assured again involved in the ruinous litigation which the adoption of a fixed and certain rule was intended to obviate."

As to the impossibility of repairing the vessel at St. Thomas, the Chancellor says : "In the case now under consideration, however, there was no impossibility of repairing the vessel, on the ground that she was in a place where there was no money to borrow, or workmen or material to be procured on credit, to make the repairs. Here the vessel was in *one* of the regular ports of *destination*, with her cargo on board when she arrived in a disabled state ; the impossibility, if any, of procuring funds or credit to make the repairs, arose from the fact that the master, either by his own fault or the improvidence of his owners, was not only deprived of the benefit of his and their personal credit, but was divested of all the other means, except the vessel itself, which the law places under his control, for the repair and preservation of the ship. I therefore concur with Mr. Justice Bronson, in the opinion expressed by him in the Supreme Court, that this was not a proper case for converting what was, in fact, only a partial loss, into a total loss." "The principle of submitting it to a jury in each case, to decide what a prudent owner would do, for the purpose of determining the right of the assured to abandon, would necessarily lead to ruinous litigation and would deprive both the insurers and the assured of all the benefits of the rule as to the extent of

repairs exceeding half the value of the vessel." "I think, therefore, that the judgment is erroneous and should be *reversed*; and a *venire de novo* awarded to enable the assured to recover his actual damages as for the partial loss only."

With this opinion of the Chancellor, Senators Verplanck and Wager concurred in holding, as did the Supreme Court, that the underwriters were not discharged by the *unseaworthiness*, as the loss was not actually occasioned by the want of the anchor. They also concur with him as to the liability of the underwriters for a *partial loss* only, but as to the deduction of *one-third*, they say nothing. On the question being put, "*Shall this judgment be reversed?*" all the members of the court with one exception voted in the affirmative, and the judgment of the Supreme Court was *reversed* accordingly.

¶ The manner in which the Chancellor has stated the *second* question in this case, might lead one to suppose without an examination of it, *in extenso*, as reported in other courts, that the question of deducting one-third new for old had *necessarily* arisen, or, at least, had been discussed in some shape by the counsel or the court below. No trace, however, is found in the report of the case, either in 15 Wend., or in 20 Wend. in the Court of Errors, that such a point was made in the Superior Court, on the trial of the cause, or on the argument in the Supreme Court, or even on the argument in the Court of Errors. Yet the Chancellor thus states the question, in his opinion: "2. Whether the master was justified in selling the vessel, for the want of funds to repair, in her third port of discharge after the commencement of the risk; *although the actual cost* of repairs at that port, *deducting one-third new for old*, would, if the master had been furnished with funds, or had possessed the ordinary means of obtaining them, have been less than half the value of the vessel, as fixed by the parties in the policy."

Now, if there were no other objection to the decision of the Court of Errors in this case than the mode in which the question of *one-third new for old*, is thus, in the Chancellor's statement of the second question, smuggled into the cause, that alone ought to strip it of a large share of the re-

spect which we in general entertain for the decisions of the Court of Errors, and those of the Chancellor himself. But we can not, and we ought not to remain silent where we see a most material point, which had not been raised in either of the courts below, first started by the highest law member of the Court of Errors; argued by him *solus*; decided by him alone; no counsel heard upon it; no deliberation of the other members of the court upon it; and no intimation by either of the other two members who delivered opinions, that such a question was or could be legitimately presented for decision. Under such circumstances, with all our respect for the ingenuity, ability, and we might add, adroitness, displayed in the Chancellor's opinion, yet, as to his opinion on *that* point, the very *manner* of its introduction should deprive it of all *authority* as a precedent in our commercial jurisprudence. If the Chancellor deemed this question of the deduction of one-third fairly presented to the court by the facts in the case, why did he not move for a *re-argument* of the cause, as to that particular point? This, it must be admitted, is the ordinary course in courts of superior jurisdiction, where a question deemed material to the decision of a cause has been overlooked, or but slightly argued by counsel, the court comes to consider it as a material, or perhaps, the turning point in the cause. To do otherwise, seems to be not only an injustice to the counsel, but a positive wrong to the party against whom the decision may be made. It is to decide his cause unheard; it is to hear a *part* of a cause and to decide the whole upon the part remaining unheard. Nor is this the only objection to such a mode of proceeding. It exposes the judge who pursues it to the temptation, to some minds almost irresistible, of showing himself, if not "*sapientior sapientissimis*," at least, *astutior astutissimis*. It is an open announcement by the judge that the counsel, notwithstanding their study, research, and intimate acquaintance with the facts of the case, have mistaken the real, the true point in it, while he, the judge, has the sole right of discovery. The practice on such occasions, of ordering a re-argument, seems not only to be demanded by judicial gravity and deliberation, but by a strict sense of justice to the suitors. In this case the assured had not only a right to

be heard upon the question of one-third new for old, if it were deemed an open one upon the facts; they had also a right to object to its being raised for the *first time* in the Court of Errors, as the objection might probably have been obviated by evidence, or the judge's charge, in the court below. Even granting that the rule of deducting one-third new for old in such cases of *total technical loss*, in order to ascertain the party's *right to abandon*, were ever so well settled, the assured had a right to show, at all events, that it was not applicable to a case where repairs were *impossible*. He had a further right to contend that the question of such impossibility, notwithstanding the imputed negligence of the assured in regard to providing funds for the purpose of repairs, was a question for the *jury*, and for the *jury alone* to determine. Of these questions, in their order.

But first, let us see what new force the case of *Smith v. Bell* had acquired on this subject, by any subsequent decisions in our own courts, or by such recognitions as could be considered a judicial acquiescence in its authority. As to express decisions upon the point, there had been none down to this case of the *Am. Ins. Co. v. Ogden*; at least, none are reported. And in regard to judicial recognitions of it as a precedent, we have not been able to find a single *dictum*, of any judge but Chancellor Walworth himself, in support of its doctrine. The first occasion which he seized in the Court of Errors to promulgate this doctrine, was in 1829, in the case of *Dickey v. The Am. Ins. Co.*, 3 Wend. 658. In that case, the Supreme Court had decided in 1825, that "as the master had *repaired the vessel*, and she was in the actual prosecution of her voyage, at the time of abandonment, although that fact was not then known to either party, the right to abandon was gone, and the assured was entitled only to recover *for a partial loss*." This decision was in conformity to that in the case of *Church v. Bedient*, and in *Peyton v. Hallett*, 1 C. C. E. 21. *Ante* p. 246. No question was made as to the loss having been a total technical one, and entitling the assured to abandon, if the repairs had not been made. Yet the repairs are stated to have been "upwards of \$14,000 only, not \$15,000, which according to the Chancellor's calculation in this case, would have been necessary to

make it a total technical loss. He himself admits this case of *Dickey v. Am. Ins. Co.*, to have been a total technical loss. He says, p. 662: "There is no doubt in this case that a technical total loss had occurred, and that the assured abandoned immediately on hearing of the disaster." But he has prefixed to this admission the following *præmium*; "It is a well settled rule of American insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state, and render her seaworthy, will exceed *three-fourths* of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. The injury is usually spoken of as an injury to more than *half her value*, because in estimating the repairs, one-third is deducted on the ground that the vessel is made more valuable by substituting new materials for old." Now, did this case call for any such expression of opinion, as to this mode of *calculating repairs*, so as to determine the right to abandon? And if it did, would not the result be the very opposite of that at which the Chancellor arrives? But either way, this earliest expression of the Chancellor on the subject, is but an *obiter dictum*, that adds no weight to the decision of his predecessor, Chancellor Lansing, in the case of *Smith v. Bell*. We come next to the case of *Center v. The Am. Ins. Co.* decided in 1829.

In the case of *The American Ins. Co. v. Center*, 4 Wend. 45, the Chancellor also has discussed this and another question, and given us the full benefit of his peculiar doctrines as to both. He there says: p. 49, 50—51.

"This is an action upon a policy on the *freight* of the ship *Pallas*, on a voyage from New Orleans to Havre; and the right of the plaintiff to recover for a total loss depends upon the question, whether there was a valid abandonment to the underwriters upon the policy on the *ship*. I shall, therefore, proceed, in the first place, to examine that question."

"From whatever source the principle was derived, it is now well settled in this country that the assured may abandon for a total loss whenever the ship is injured by the perils insured against, to a *moiety* of her value. But there has been some diversity of opinion as to the mode of applying

the principle to particular cases. On the trial of the suit on the ship policy it was insisted, on the part of the underwriters, that in determining the question of total technical loss, the assured was bound by the valuation in the policy; and that he had no right to abandon, unless the expenses of repairs, after making the usual deduction, would exceed a moiety of the value as thus fixed. Having at *that time*, a very imperfect knowledge of insurance law, I* decided that question against the underwriter on the authority of *Peele v. The Merchants' Ins. Co.*, 3 Mason's Rep. 27, which case had then been published only in pamphlet form. As the counsel for the assured were not willing to risk their cause upon Judge Story's opinion on that point, they waived the benefit of my decision in their favor, before the cause went to the jury. Although this question was afterwards argued in the Supreme Court, it does not properly arise upon the bill of exceptions in this case; and I merely notice it here for the purpose of saying that the doubts I entertained as to the correctness of my decision on this question at the trial, have not been weakened by subsequent investigation and reflection. *The extent of the injury is to be calculated with reference to the value of the ship before the disaster. Hence the application of the principle of deducting one-third from the estimated expense of full repairs*, for the purpose of ascertaining whether she is injured to a moiety of her value."

"For the purposes of this suit, the value of the ship at the time of the disaster is fixed at \$10,000 as estimated in the policy. It is also found by the jury that the expense of full repairs of the ship at New Orleans, including copper at its usual price at that place, would have exceeded a moiety of that sum after making the usual deduction of one-third. But full repairs could not have been made at that port, because *no suitable copper was to be had*." "The counsel for the assured suppose this was a sufficient cause of abandonment, although the ship was not injured to a moiety of her

* This cause was tried at the New York Circuit in April, 1826, before the Chancellor, he being then one of the circuit judges of the state. *Reporter's note.*

value. I know of no principle which can authorize the abandonment of a vessel, either in port or elsewhere, because materials cannot be had there to make full repairs. If the ship is not injured to a moiety of her value, *it is the duty of the master to make her seaworthy*, and to proceed on her voyage; and if the assured completes the repairs afterwards, the underwriters must pay the additional expense, so as to furnish a complete indemnity."

The Chancellor, it must be observed, himself admits that "from the facts found by the jury, there was a total loss of the ship, viewing the case in the most favorable light for the underwriters." Per Walworth, Chancellor, 4 Wend. p. 52. The deduction of one-third new for old having been made, the case is still within the category of total technical loss. Where, then, was the necessity or propriety of this passing *protestando* against the authority of the case of *Peele v. The Merchants Ins. Co.*, decided by Mr. Justice Story? The benefit of the Chancellor's decision in favor of the assured on this point, had been waived at the trial before the cause went to the jury. p. 50. The question, therefore, of deducting one-third new for old to determine the right of abandonment could not possibly arise in the case. This *iteration* of the doctrine seems also to call in question the weight and effect given by the jury to the survey and report of the port-wardens, ship-masters, and ship-carpenter at New Orleans, and leads us to infer that if the loss had not, after deducting one-third new for old, exceeded half the value of the vessel as fixed by the policy, the Chancellor would have disregarded the survey and estimates at New Orleans, and have insisted upon applying his and his predecessor's Procrustean rule to this very case of *The Am. Ins. Co. v. Center*, although as the report states, (p. 46, 4 Wend.) "A survey was held by the port-wardens, assisted by three ship masters and a ship-carpenter—associated with the wardens at the request of the agent of the insurance companies of New York resident at New Orleans,"—"and the wardens and the others concurred in the opinion that the expense of repair would amount to nearly the full value of the ship; and that it would be more to the interest of all concerned to abandon and have her sold for whatever she might bring, than to put

upon her the expenses necessary to place her in a seaworthy condition." And such is the tendency of the remarks he makes in page 51, as to the *duty* of the master, if *he* had decided to repair." As if *he*, the *master*, was justifiable in disregarding the result arrived at by this commission of surveyors on the spot; nay more, under an obligation to reject it and to govern himself by the rule insisted on by the chancellor, as the certain and invariable criterion of the right of abandonment. "If the master had decided to repair in this case, what would have been his natural course? As he could not re-copper her at New Orleans, the ship would have been rendered sea worthy for the voyage by wooden sheathing of a proper thickness to receive the copper afterwards; and there being no copper fastening at New Orleans, iron fastenings must of necessity have been used." What master would take such a responsibility after calling a survey? Why, if the ship thus tinkered, had been wrecked or foundered on the voyage, is the Chancellor so very a fresh water sailor as not to know that the master could never expect to get another vessel during the remainder of his life. And when the Chancellor says, "I know of no principle which can authorize the abandonment of a vessel, either in port or elsewhere, merely because materials cannot be had there to make full repairs,"—does he, could he mean to say that the question of making repairs or not in such a case, is not to be decided by *evidence* of the state of the vessel, by the opinions of experts, and other pertinent matters to be *submitted to a jury*? Or, does he really mean to say that, in such a case, if the actual damage is not, after deducting one-third new for old, more than half the value estimated in the policy, that then there is *no room* for the question of abandonment? It is admitted that no such rule exists or ever did exist in England. The courts of that country have paid more heed to the rights of juries in such cases. They have not sought to withdraw these questions from their true natural arbiters. That *general principle* is far more important than either of the questions on which the Chancellor thinks it so indispensable to have an uniform rule.

But it should also be mentioned that in this very case, the Chancellor's opinion, although as extra-judicial as could well

be, did not pass without a *dissentient* voice from one of his colleagues in the Court of Errors. Senator Allen, who delivered the only other opinion, took occasion to express his opposition to the doctrine of the Chancellor's opinion, on this point of deducting one-third new for old, although he concurred in the *unanimous* opinion of the court, that the judgment of the Supreme Court should be affirmed.

Senator Allen says, p. 55. "The value of the policy is, *in general*, a good criterion by which to judge of the value of the ship; and the expense of repairs at the port where she has taken shelter, is the rule by which to determine the amount of injury received, and the estimate must be such as will fully reinstate the vessel with the same or equally as good materials, as she was composed of at the time of the disaster. On the subject of repairs, *one-third new for old*, there appears to have been opposing opinions. The case of *Dupuy v. United Ins. Co.*, (3 J. Cas. 182,) on one side, and *Dunham v. Com. Ins. Co.*, (11 J. R. 315,) on the other. But in my view, the deduction of one-third new for old will hardly apply to cases of abandonment for a total loss; the assured in such case receives none of the benefits intended by the rule."

(Senator Allen cites the case from 11 J. R. 315, as though it were a case in which a deduction of one-third new for old, had been sanctioned by the Supreme Court, in a case of *total technical loss*. But the case was one of *partial loss and actual repair*, and there was no claim of total loss, nor was there any abandonment. The only question there decided as to the deduction of one-third, was, that it was to be made whether the vessel was *new* and on her *first voyage*, or was not. He probably meant the case of *Smith v. Bell*.)

But it is time to hear Judge Story, in support of the doctrines, which he laid down in *Peele v. Merchants' Ins. Co.* which the Chancellor is thus anxious to put under outlawry. In *Peele v. Mer. Ins. Co.*, 3 Mason's R. 70, after saying that it is a fixed rule, that the assured may abandon when the vessel is injured to more than half her value, Mr. Justice Story says:

"But here we are met with *two* difficulties on points of law, which it is singular, considering the antiquity of the

rule, should not have been long since definitely adjudged, as it is impossible, that they should not often have arisen. The first difficulty is, as to the mode of ascertaining the value of the ship. The second is, as to the mode of ascertaining the *quantum of expense or injury*. Is it to be the actual cost of the repairs, or the actual cost deducting one-third new for old?"

"Upon the first point, it is contended by the defendant's counsel that the valuation in the policy is conclusive, and affords the only just means of ascertaining the value, it being as between the parties, the *agreed* value of the ship. The plaintiffs deny this doctrine, and insist upon the actual value of the ship, at the time of the loss, as the true value."

"Nothing is more familiar or more clearly settled, than the doctrine, that the valuation in the policy is conclusive in case of a total loss; but it is inapplicable for the purpose of ascertaining the *quantum of injury*, (for it is quite another question as to the *quantum of payment* to be made by the underwriters,) in case of a partial loss of goods. When the policy is on goods, the invariable rule is to ascertain the quantum of injury by the difference between the price of the sound and damaged goods; and the reasons of the rule have been expounded with so much force and accuracy, that it would be a waste of time to repeat them."

The learned judge then says, that "The real object of the valuation is to decide if the ship be worth repair. The law deems her worth repair unless injured more than half her value. *At what time?* Surely at the time of the injury, and not at the commencement of the voyage; for to *that period only*, can the *worthiness of repair* apply. The value at the commencement of the voyage, might be a third greater or less than at the time of stranding; and thus the right of abandonment would be made to depend not upon the proportion of *present value* (to the repairs) but upon the value at a former period. The ship might be damaged three-fourths of her present value, and yet an abandonment would not be good; and on the other hand, she might be damaged only one-third of her present value, and yet it would be good. It does not strike me that such a state of things is

consistent with the true meaning of the rule as to the half value.

"Then as to the bearing of the authorities on this subject; I have looked into all the cases, and I can not find an instance, in which the doctrine as to the half value of the ship, is referred to any other period of the voyage, than that of the happening of the calamity, or the subsequent arrival in port. In short, to the very time when the question arises, of *reparable or not*? The very point arose in *Fontaine v. The Phenix Ins. Co.*, 11 J. R. 293, and the learned Chief Justice, Kent, ruled at the trial, that the value at the port where the injury happened, and not the valuation in the policy, was to be taken in applying the doctrine of abandonment. A new trial was ultimately granted upon another point; but the inclination of the court manifestly upon this point was, that the ruling of the Chief Justice was right. In the absence of all contradictory authority, the decision of his luminous and accurate mind would go very far to satisfy mine, even if I entertained, which I certainly do not, any doubt on the subject. The foreign writers also, who have treated the subject, appear to me to have proceeded upon the tacit assumption and recognition of the same doctrine in all their reasonings."

"Then as to the other point, whether the actual cost of the repairs to the owners, on the cost, deducting one-third new for old, is the rule by which we are to ascertain the *quantum* of injury or loss? That is a point upon which a great deal may be said on both sides. The propriety of the allowance of one-third new for old, in cases where the ship is not abandoned, or in other words, in cases of a partial loss, is not contested. The rule itself is somewhat arbitrary, and not founded upon any exact calculation, with reference to the particular case. The ship may be almost or entirely new, and then the reason for the deduction would altogether cease. The ship may be very old, and then the reason for a much greater allowance would apply." "Still the rule is arbitrary, and therefore is to be confined to the cases, where the usage is clear, or to cases which necessarily fall within their analogies. Does it then enter as an ingredient into the rule of abandonment, where there is a loss of half the value.

"In examining the authorities, it is beyond all doubt, that no case in England has ever recognized any such deduction of the one-third, except in cases of a partial loss. In all the cases where the injury to half the value has been in question, not the slightest allusion is made to any such deduction by court or counsel. Yet some of these cases would seem to have called for some expression in its favor, if it existed. In *Da Costa v. Newnham*, 2 T. R. 407, the deduction was held not to apply, except when the owner received back his ship, upon the plain ground that the owner ought not to pay where he received no benefit.

"The question however has arisen in *America*. In *Dupuy v. The United Ins. Co.*, 3 J. C. 182, the point was directly in judgment, and indeed formed the turning point of the cause. And it was there held by the *unanimous* opinion of the Supreme Court, that the deduction was not to be made; and that it was the actual damage of expenditure which was contemplated by the rule, without any reference to the distinction of new for old. That decision was subsequently acted upon by the court, and though it was finally overturned by the Court of Errors, it is impossible not to feel, with all due reverence for the latter tribunal, that upon questions of this nature, the learning, experience, and distinguished talents of the Supreme Court of New York, entitle their judgment to very great consideration. I have examined the reasons given by the Court of Errors for the reversal, 2 C. C. E. 153, and I am compelled to say that they do not convince my judgment. *Ego assentior Scævolæ*. The case of *Coolidge v. The Gloucester Ins. Co.*, 15 Mass. R. 341, appears to me to have contemplated it in the same light; and I take occasion to add, that if in that case, the deduction of one third new for old had been made, and the valuation in the policy had been taken, there would not have remained an *expense* of one half the value of the ship to justify an abandonment. My judgment upon the whole is, that the deduction of the one-third can not be legally made in cases of this nature!"

Now, upon the first point discussed by Judge Story, viz., in regard to the rule of valuation, as to repairs, whether we are to take the estimated value in the policy as the criterion,

in all cases, or that of the actual value of the ship after the disaster, we do not intend to be drawn into the debate. The authorities on the one side are the decisions of Judge Story in this case, and in the case of *Robinson v. The Commonwealth Ins. Co.*, 3 Sumner's R. 220; the cases of *Patapsco Ins. Co.*, 5 Pet. R. 604; and *Bradlie v. Md. Ins. Co.*, 12 Pet. 378. On the other side, these dicta of Chancellor Walworth, and his opinion in *Am. Ins. Co. v. Ogden*, and the case of *De Blois v. The Ocean Ins. Co.*, 16 Pick. 312. It may suffice to give as to this point of value in the policy, the following from Chancellor Kent's Commentaries, which sufficiently indicates his opinion.

Chancellor Kent, in the 5th edition of his Commentaries, 3 Kent's Com. 330-331, in discussing the rule, "one half of the value," says:

"The meaning of the words in the rule, 'one-half of the value,' has been held to be, the half of the general market value of the vessel at the time of the disaster, and not her value for any particular voyage or purpose." And he cites the case of *Bradlie v. The Maryland Ins. Co.*, 12 Pet. 378, assenting to the rule there laid down, that "if the ship is not or would not be worth, at the place of repairs, double the cost of repairs, it is a total technical loss." He proceeds. "In ascertaining the value of the ship, and the quantum of expense or injury, difficulties have arisen, and they were fully discussed and very clearly explained in *Peele v. Mer. Ins. Co.* The valuation in the policy is conclusive in case of a total loss; but in some respects, it is inapplicable for the purpose of ascertaining the quantum of injury in case of a partial loss of goods. The value of the ship at the time and place of the accident, is the true basis of calculation.* And with respect to the arbitrary and fluctuating rule as to the allowance of one-third new for old, there is no doubt of its application in cases of partial loss; but such a deduction is not allowed, and does not apply to cases of total loss."

* Note of Chancellor Kent to this passage, 3 Kent's Com. 330.

"*Patapsco Ins. Co. v. Southgate*, 5 Pet. U. S. Rep. 604.

"The valuation in the policy, at the home port, or in the general market of other ports, constitutes no ingredient in

ascertaining whether the injury by the disaster is more than one half of the vessel or not. *Bradlie v. Md. Ins. Co.*, 12 Pet. 378. This decision pronounced by Mr. Justice Story, was in conformity with the doctrine declared by him in the case of *Peele v. The Mer. Ins. Co.*, 3 Mason, 27, but a different rule has been adopted in Massachusetts and New York, in avowed contradiction to the decisions in the federal courts. It is held in the courts in those states, that the value of the vessel, as agreed upon by the parties and inserted in the policy, is to be taken as the true value in determining whether the repairs would exceed half her value in reference to the question of abandonment; and that it governs as well when the assured claims for a total *technical loss*, as when he claims for a loss by a total destruction of the ship; and further, that in determining the *same question*, the deduction of one-third new for old, was to be made from the estimated amount of the repairs." He cites as to Mass., *De Blois v. The Ocean Ins. Co.*, 16 Pick. R. 312. N. Y.: *Am. Ins. Co. v. Ogden*, 20 Wend. 287, 297-300.

Those pages, '297-300,' embrace Chancellor Walworth's opinion on those points which Chancellor Kent seems to have considered as decided by the court. But, as we hope to have shown already, they were mere *obiter dicta* in that case, and not entitled to any weight as an adjudication.

Now in the case of *De Blois v. The Ocean Ins. Co.*, so much relied on by Chancellor Walworth,—Putnam, J., who delivered the opinion in his turn, relies entirely and solely, for supporting the rule of deducting one-third in cases of *total technical loss*, upon the case of *Smith v. Bell*, as his authority. He cites no other, and he could not at that time, cite any other from our New York reports, in support of it. He declines to notice the opposing case of *The Patapsco Ins. Co. v. Southgate*, which was decided in the Supreme Court of the United States, at the January term, 1831, although he was delivering his opinion on the same points ruled in that case, at the October term, 1834, when he surely must have read that decision. But he does not even recognize its existence!

Our learned Chancellor, also, in the case of the *Am. Ins. Co. v. Ogden*, seems to have been afflicted with the same obstruction of judicial vision. The case of *Peele v. The Mer. Ins. Co.*, decided in 1822, is the latest and only case

referred to as sustaining the doctrines he was assailing; but the case of *The Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, decided two years after by the Supreme Court of the United States, in full affirmance of those doctrines—by some unaccountable oversight, did not receive or was not deemed entitled to, the Chancellor's attention upon the question.

We have thus far seen, how and when this rule in regard to deduction of one third new for old in cases of *total technical loss*, had its origin in the state of New-York. We have seen how far it has been supported by subsequent *dicta*, in the absence of decisions, properly so called, in our courts down to the case of *The Am. Ins. Co. v. Ogden & Macomb*. We have shown that the question did not and could not arise in that case; and the manner in which it found its way there. We have sufficiently shown how it became adopted in Massachusetts; and that so far as we have now gone, it has found no countenance in the Supreme Court of the United States, but a direct and uniform negative. It is true the Supreme Court of Massachusetts has adhered to it, in form; though the question it appears, was met by their insurance companies after the long litigation in the case of the *Argonaut*, by a special clause in their policies.

In *Orrok v. The Commonwealth Ins. Co.*, 21 Pick. Rep. 456, Putnam, J. mentions the clause as follows:

"It is agreed that the insurer shall not have the right to abandon the vessel for the amount of damages merely, unless the amount which the insurer would be liable to pay under an adjustment as for a *partial loss*, shall exceed half the amount insured." 21 Pick. 467.

"This clause, says Putnam J., was introduced after the long litigation in the case of *Peele v. The Suffolk Ins. Co.* 7 Pick. 254, and was intended, without doubt, to provide by agreement for the construction which the underwriters contended to be right in the case relating to the *Argonaut*. They intended that the value in the policy should be the rule upon which the calculation should be made; and they intended that one-third new for old, should be deducted; and that if the loss exceeded one half of the value in the policy, or (as it is expressed) of the amount insured, then it should

be a constructive total loss." (See also *Hall v. Same*, 21 Pick. R. 472. *Reynolds v. Same*, 22 Pick. 191.

In South Carolina, the question has, so far as we have been able to ascertain, received no other judicial notice than is to be found in the case of *Cohen v. The Charleston Ins. Co.*, 1 Dudley's S. C. R., 147. In that case the Court of Appeals, O'Neill J. delivering the opinion of the Court, affirmed the doctrine of the Supreme Court of the U. S. He said, p. 151: "I have no doubt that in the case of a claim for a total loss, if the repairs at the port where they are to be made, will exceed one half the value of the actual value of the vessel at that place after she is repaired, that the assured may abandon and claim for a total loss. *The Patapsco Ins. Co. v. Southgate, & al.*, 5 Pet. Rep. 619." He adds, it is true:

"But I did not confine the jury to this view; I told them that in a claim for a total loss, it was questioned by able jurists, whether in ascertaining the amount of repairs, one-third new for old ought to be deducted? Phil. on Ins. 403, and that they in this case take the affirmative of the question as granted, and deduct one-third new for old, and assume the value of the vessel to be, as it was when she sailed \$3,000. In this point of view the cost of repairs exceeded one half, for the total cost was estimated at \$2,400; deduct one-third, \$800, would leave the cost of repairs \$1600; exceeding by \$100 the half of the value of the vessel;" and the motion for a new trial by the underwriters was dismissed.

Some reference is made in the Chancellor's opinion in the *Am. Ins. Co. v. Ogden*, to the French law of abandonment for damage sustained by the ship; and he refers to art. 369 of the Napoleon Code of Commerce, in a way that might lead one unacquainted with the French law of Insurance to infer that it did not permit abandonment unless the damage exceeded three-quarters of the value of the vessel. This would be an entire misapprehension of the provisions of the French code, and contrary to all the decisions of their courts upon the subject. By the 369th article of the Code du Commerce, § 3, it is provided;

"Du Délaissement."

"Art. 369. Abandonment of property insured may be made,

1. In case of capture ;
2. Of shipwreck ;
3. Of stranding with bilging (*avec bris*) ;
4. Of innavigability by perils of the sea ;
5. In case of arrest by a foreign power ;
6. In case of loss or deterioration of the property insured, if the deterioration or loss amounts to at least three-fourths ;
7. It may be made, in case of arrest on the part of the government, after the voyage commenced."

Under the provisions of this article, the facts in the case of the American Insurance Co. would have constituted a clear case of *innavigability*, according to the definition of Pardessus. "When, in consequence of accidents the ship is reduced to a wholly disabled condition, (*une dégradation entière*) or that certain of her essential parts are in so irreparable a state that she can no longer exist and accomplish her destination (*plus subsister et remplir sa destination*) which is styled *innavigability*, the captain may exercise the right which we have indicated in art. 606, and ought to do all in his power to procure another ship."

"If the damages (*dégradations*) are reparable, and it is necessary to raise a loan for that purpose, he ought to proceed as we have stated in art. 631," &c., 3 *Pardessus Cours de Droit Commercial*, p. 82, § 644. And so well is it understood in France, that the mere inability to raise funds by hypothecation of the ship, or the want of materials or workmen, is a good cause of abandonment for *innavigability*, that the assurers of Bourdeaux have inserted in their policies a clause expressly to provide against what is called the *relative* or *constructive* innavigability, produced by inability to procure funds, materials, or workmen for repairing. *Le Monnier, Commentaire sur les Principales Polices d'Assurance Maritime usitées en France* ; vol. ii., p. 2. "This article, says Le Monnier, is in express derogation of the dispositions of articles 369 and 375, of the Code of Commerce, And, under this clause of the Bourdeaux policy, excluding

abandonment except for *innavigability by perils of the sea*, or *absolute innavigability*, even loss or damage to the amount of three fourths, does not give the right to abandon." Le Mounier thus distinguishes the two kinds of innavigability. "*Absolute innavigability* is when the ship is physically innavigable; altogether incapable of being repaired and resuming her voyage: *relative innavigability* is when the ship is temporarily incapable of navigating, but nevertheless susceptible of reparation; but can not, whether on account of destitution of materials or workmen, whether for want of money or credit, receive the repairs which are indispensable to enable her to proceed to sea; both of these confer the right to abandon." Vol. ii., p. 42, § 268. It is admitted that the English rule, also, admits the right of abandonment for a *technical total loss*, under such circumstances, to be a *proper question for the jury*, according to the facts of each particular case, without deduction of one third new for old, in determining the right of abandonment. Let us now see how stands the French law and the usage and custom of other commercial nations as to this deduction.

A very late writer on the law of insurance in France, M. Isidore Alauzet, in his "*Traité General des Assurances Maritimes, Terrestres Mutuelles et sur la vie*,"* a work of high reputation and ability, has treated of it expressly, and has given us all requisite information upon the subject so far as France and her dependencies are concerned. In the second volume of this work, p. 153, he says:

"§ 322. In the action authorized for damages sustained by a ship, the code has not provided for a circumstance deserving a serious attention. All ships undergo every day, in the course of their navigation a gradual decay, (*deperissement*), which extends to all their parts; yet, if at the moment of setting sail, the ship ought to be in a condition to support the voyage which she is undertaking, it does not follow that her hull must be entirely new, or her tackle and apparel must be in a state the most perfect. When, in con-

* "A general Treatise upon Assurances; Maritime, Terrestrial, Mutual and upon lives." By Isidore Alauzet, avocat, &c., Paris, 1843.

sequence of damage for which the assurers are liable, there is occasion to replace *objects* which have suffered either an average or a total loss, the integral payment to the assured of the value of the new objects put in the place of old or long used ones, will constitute an evident benefit to the owner; so that there are but few policies in use, which have not in their printed forms an express clause in this respect, purporting that all replacements, (*remplacements*,) furnitures, and workmanship, with which the assurers are charged, shall sustain a reduction of one-third upon the actual proved cost at the place of repairing, as a compensation for the difference between old and new."

This clause has been criticized by M. Dageville:

"In general," he says, "the assured gains nothing by having new for old; new wood, which is put upon old, does not render the latter any better; an old anchor, which has been well tried, is preferable to the uncertain merit of a new one. The assured may gain something in respect to sails and cordage; but to this time no attention has been paid to these feeble advantages." Dageville, vol. 4, p. 7. "In effect, continues M. Alauzet, we do not find that any ancient author has spoken of such a clause, nor is it to be found in any of the precedents of policies, which have come down to us. We do not, nevertheless, concur with the opinion of M. Dageville; but we ought to rectify what his observations contain inaccurate in point of fact. In the clause under consideration, anchors are always excepted; no deduction is made from the price of new anchors; where the reduction takes place upon isolated objects, replaced in kind, such as a cable or a sail, the clause appears entirely reasonable; and in the case of repairs put upon the hull of the ship, such a reduction may sometimes prove a hardship; even then, however, the criticism will not be always applicable."

"However this may be, if the clause is inserted, it is valid; but *in the absence of all stipulation*, can the assurer claim a deduction from the assured upon the cost of repairs, with the view to compensate for this difference between the old and the new? The Court of Aix, has resolved this question affirmatively, (Aix, 28 June, 1831. *Journal du Palais*, vol. 23, p. 1754.) It is in opposition, upon this point, with the

Court of Cassation, which has decided that where the policy is silent, the assurer is liable to repay the integral amount of the expenses incurred, without any deduction from the price founded upon the general usage of commercial places, (Cassat. 13 July, 1829; *Journal du Palais*, v. 22, p. 1238.) We can not but approve this doctrine; however equitable such a clause may appear, it is impossible for us to find in the law itself, any provision, authorizing us to supply it."

Such scruples, with respect to "*supplying new clauses*" in effect, to policies of insurance, may seem overstrained to those who can admit that Chancellor Lansing had a right to supply the new and unheard of rule in *Smith v. Bell*, and still more to those who admire the "happy audacity," with which Chancellor Walworth has pushed the doctrine of the *value in the policy* being the sole criterion, by which the right of abandonment is to be tested. Whence did he derive this rule for our courts in New York, when in the case of *Center v. The Am. Ins. Co.*, at the New York Circuit, he first sought to introduce it? No such rule had then been sanctioned by judicial decision in the courts of New York. On the contrary, the only case then extant in our books, upon that subject was that of *Fontaine v. The Phoenix Ins. Co.*, 11 J. R. 293. In that case, which was tried before Chief Justice Kent, at the New York sittings, in November, 1813, he charged the jury upon the facts of the cause, as follows:

"That the remaining question would be, whether there had been a partial or a total loss. That the vessel was driven ashore by a tempest, and the surveyor certified that she ought to be sold; that such certificate was not conclusive, but if made *bona fide*, it was strong evidence. Presuming it to be an honest survey, it stated that the vessel could not be got off and repaired for half her value: that the value to be taken, in estimating whether she could be got off and repaired for one half, was not the value specified in the policy, but the value at Martinique, where the injury happened. It was immaterial whether she was in fact, got off for \$100 or nothing. The case at the time of the survey appeared desperate, and the good fortune of the subsequent purchasers, could not destroy the right of the plaintiff." Not a word in regard to the deduction of one-third new for old, in fixing

the *half value*, is to be found in the charge of the Chief Justice. The case of *Smith v. Bell* was exhumed, on the argument before the Supreme Court, by one of the counsel for the defendants; but only on the point of valuation according to the policy. It seems, as to the other point, to have been tacitly repudiated. The plaintiffs having obtained a verdict for a total loss, a motion for a new trial was made, and it was granted solely on the ground that the trade in which the vessel was engaged, was in violation of the act of Congress, interdicting commercial intercourse between the United States and Great Britain and France and their dependencies, (of March 1st, 1809.) Yates, J., who delivered the opinion of the Supreme Court, thus concludes, after discussing the illegality of the trade:

"Although, on the other points, *I am inclined to think the case is with the plaintiffs*, yet the objection made by the defendant's counsel on the ground of forfeiture, being insurmountable, it can not change the result; a new trial must therefore be granted, with costs to abide the event." 11 J. R. 301.

And now if we had not renounced the controversy as to the value in the policy, we might pause here, and in the absence of all intermediate judicial decision, we should be entitled to demand by what right, by what authority, by what new patent of paramount jurisdiction, the learned Chancellor in the case of the *Am. Ins. Co. v. Ogden*, in the Court of Errors in 1829, uses the following extraordinary language. Speaking of the rule of the *valuation* in the policy being the *exclusive* one, he says: "*The courts of this country should be careful*, how they depart from the *established rule* or they will find the underwriters and the assured again involved in the ruinous litigation which the *adoption of a fixed and certain rule* was intended to obviate."

"Depart from the *established rule*!" Have we not already shown that this "*fixed and certain rule*," had found no resting place in England, none in the courts of this country, until thus attempted to be foisted upon us, first in the case of *Center v. The Am. Ins. Co.*, and next in this very case of the *The Am. Ins. Co. v. Ogden*? That no court in the

Union had adopted it but the Supreme Judicial Court of Massachusetts? That however well it may be settled there, it is settled the other way in the Supreme Court of the United States, and that it has never yet been legitimately adopted by any other state court? That all these *dicta* of the Chancellor are of no authority as judicial expositions of the law in that respect, and ought to be adjudged as the French courts say, "*non-recevables*?"

As to the other point, on which we are combating the doctrine and the authority of *Smith v. Bell*, we regard that case as a monstrous absurdity; founded upon a ludicrous misapprehension of Chancellor Lansing, in regard to the grounds of the decision in *Da Costa v. Newnham*. It is not only absurd, but it is positively unjust. The same reasoning that would establish such a deduction of one-third in the case of a *total technical loss*, might be invoked with equal force in favor of the deduction, where the ship foundered at sea and went down to the unfathomed caves of ocean, after losing all her spars, tackle and apparel.

But we have perhaps, already pursued this subject at greater length than the intrinsic importance of the question may seem to justify. It is not, however, on account of the magnitude of this single question, that we have thus dwelt upon it. It is because we have sought to trace and to expose this dangerous attempt at judicial legislation. It is because we feel the force and the obligation of the sentiment of Alauzet: "However equitable such a clause may appear, it is impossible for us to find in the law itself, any provisions authorizing us to supply it."

One word only, as to the remaining ground upon which the Chancellor in this case of *The Am. Ins. Co. v. Ogden*, places his vote for reversing the judgment of the Supreme Court, viz.; the laches of the owner of the vessel in not *providing funds at St. Thomas* for the repairs. Mr. Justice Bronson had previously taken a somewhat broader ground; and held that the mere inability to procure funds for that purpose, was not, *of itself*, a sufficient ground of abandonment, in a port of destination. He does, in his dissenting opinion, it is true, talk of the assured as "sending out his vessel without *furnishing the master* with a single dollar

to pay any necessary expenses ; having no credit with his correspondent, the consignee, nor with any one else ;" and he adds, " And he is still permitted to recover as for a total loss on the single ground of the inability of the master to procure the necessary funds to make repairs." 15 Wend. p. 541, 542. The Chancellor rather narrows this ground, and puts it upon the *laches* of the owner, in the particular case, not in having neglected to furnish the *master with funds* on his sailing, but with not having provided funds at the port of destination, or rather at this "*one of the ports*" of destination. As if, where a small vessel like this is trading to and from some half dozen ports of destination, it was a *neglect* sufficient to avoid a policy, that the owner does not provide a fund at *each* of those ports of destination, equal to *half the value* of the vessel, in case of damage by perils of the sea: for such a disaster is as likely to compel the vessel to take shelter in any one of those ports, as another ; and thus he would be under equal obligation to provide such an amount of funds at all, as at any one of her intended ports of destination.

But if, upon the facts of this case, a question of *laches* in the owner does occur, in not providing those funds for repair ; though we can see no warrant for the imputed neglect ; still, this was a question for the cognizance of *the jury*, and not to be decided by the court. No decision is cited that makes such an omission a fatal objection to a recovery for a total technical loss, and still less, that it is to be taken for *matter of law*. What more legitimate question for a jury than this of *negligence*, which, it was contended, had led to the necessity of the sale of the vessel ? The question of the *materiality* of certain information withheld from the underwriters, in the case of *Walden v. The Firemen's Ins. Co.*, 12 J. R. 513, was held by Chancellor Kent, and the Court of Errors, to be a question *exclusively* for the jury, under the charge of the court, as a *question of fact*. Ante p. 253-4.

To conclude, we may in reference to this part of the case, say in the words of Chancellor Kent, on that occasion : " It is for *this principle* that I feel solicitous ; and not for any

thing in this particular cause. The case before us, is of trifling consequence ; but the distinction I have suggested, goes to the very root and essence of trial by jury."

FIRE INSURANCE.

PERRINS v. THE WASHINGTON INSURANCE COMPANY. 4
Cow. Rep. 645. On Appeal.

Not reported in Chancery.

Fire Insurance. Commencement of Risk.

THE defendants, an insurance company in the city of New York, appointed a surveyor in Savannah, Ga., and by their president empowered him to make contracts of insurance against fire, to take effect from the time when the premium *should be paid, and should be received at New York ; provided the office should recognize the rate of premium and should be otherwise satisfied with the risk.* The surveyor advertised at Savannah, the terms on which the company would insure, and subscribed himself as agent of the company at Savannah ; mentioning that they would insure through him. P., the plaintiff paid the usual premium of insurance on certain goods on the 5th of Jan. 1820 to the surveyor, who gave a receipt for the money, describing himself as agent of the company, and specifying the consideration and object of the receipt ; but before the premium was received at New York, the goods were consumed by fire, and the insured afterwards tendered the premium to the company, and demanded that they should indemnify him or execute the contract of insurance. On a bill filed upon that state of facts, claiming indemnity from the company, the Chancellor dismissed the bill, holding that the risk had not commenced ; but,

The Court of Errors *reversed* the decree and held that the company were bound to indemnify the insured, although the

premium had not been received by them before the loss, and that the premium paid being according to *their established rates*, it did not lie with the company to say that they would not recognize the rate of premium or would not be satisfied with the risk, and they were accordingly decreed to indemnify the assured.

ROBERT v. TRADERS' INSURANCE COMPANY. In Ct. of E.
17 Wend. 631.

In S. Ct., 9 Id. 474. (See S. C. in S. Ct. 9 Wend. 404, as to other points.)

Assignment of Policy of Insurance to Mortgagee. Subrogation of Mortgagor to rights of Mortgagee under a Judgment on the Policy, where Mortgage has been paid by Foreclosure, &c., the Assured having violated a condition of the Policy.

THE plaintiff in error, Robert, had procured of the defendants in error, insurance against loss by fire upon buildings owned by him, and had assigned the three policies with the assent of the insurers to secure a mortgage to one *Bolton*, upon the property insured. A loss having occurred by fire, a suit was brought on the policies by the assignee, in the name of Robert the assured, and judgment obtained against the company. The assignee, however, instead of enforcing payment of the judgment against the company, coerced payment of the mortgage by a foreclosure in Chancery. Robert thereupon gave notice to the defendants that the *mortgage* executed by him had been paid by him; that payment had been coerced by a foreclosure in Chancery, and that he claimed to be the *assignee by operation of law*, of the judgment rendered against the defendants, and would require payment of the same to be made to him. Upon receiving this notice the defendants in error made application to the Supreme Court at a special term, for an order *staying* all further proceedings *on the judgment*.

The Supreme Court held that the payment of the mortgage by Robert gave him no interest in the judgment, and accordingly made an order staying all further proceedings.

Chief Justice Savage says: "The only ground upon which the recovery in the Superior Court (upon the policy of insurance, 9 Wend. 404) can be sustained is, that Francis Bolton was the *party in interest* in this suit, and not Thomas Robert, the nominal plaintiff. Thomas Robert could not have recovered, having violated one of the conditions of the policies by insuring the same property in the Phenix Insurance Company, without giving notice to the plaintiffs in this suit. (The Traders' Ins. Co.) Whether he knew the effect of such insurance or not is of no moment; it avoided the policies, or rather would have produced that effect, had Robert been the party in interest. Robert, after the assignment of the policies had no interest in the policies nor the monies received. Payment of the mortgage gives him no interest in the judgment: what effect an *assignment* of it would have had, it is unnecessary to decide."

The Chief Justice made an order accordingly staying all further proceedings on the judgment against the defendants in error, on their paying Bolton his taxable costs.

To reverse this order, Robert sued out a writ of error, removing the record and subsequent proceedings into the Court of Errors. When the argument of the cause was called on, the defendants in error objected that the court ought not to entertain the writ of error in this case but should quash it, on the ground that a writ of error will not lie upon a *mere order of a court*, like the present; that a record should have been made up and filed, upon leave, as if an *audita querela* had been sued out by the insurance company, and judgment had been rendered in their favor: and the *Case of Negus*, 10 Wend. 34, was cited. The court took time for advisement, and refused to quash the writ of error, and directed the argument to proceed; after which, the opinion of a majority of the court was delivered by Senator Edwards.

He says: "The judgment was in the name of Robert, and the payment of the mortgage brought back to him the whole interest in the judgment as effectually as it could have been by an assignment, even had that payment been voluntary on the part of Robert; but the payment was not voluntary; he was compelled to advance the money and he had therefore a right to be substituted in the place of Bolton. Nor is he to

be deprived of this benefit on account of having subsequently obtained another policy on the same property, and not having given notice thereof while the policies in question were in the hands of Bolton as assignee." "He was not the owner of the policies when he effected the second policy, and therefore was under no obligation to give notice thereof. The Supreme Court have decided that the omission to give notice was not a good defence; that judgment has been acquiesced in by both parties."

The *order* of the Supreme Court staying proceedings, &c. was thereupon *reversed*, 13 to 6.

ALSTON v. THE MECHANICS MUTUAL INSURANCE CO. of
Troy. 4 Hill, 329.

In S. Ct. 1 Hill, 510.

*Representation ; Verbal Promise of future conduct of the
Insured.*

EXCEPTIONS to report of referees, who admitted evidence that defendant promised if the company would take the risk proposed, to discontinue the use of a fire-place in the basement and use a stove instead; but after obtaining the policy, used the fire-place still—in consequence of which the building was burnt. Report for defendants.

The Supreme Court held the evidence admissible; that a *representation* like a *warranty* may be affirmative of the present or promissory of the future. On Error,

The Court of Errors *held* that a representation in the nature of a promise or stipulation for *future conduct* on the part of the assured, must, in general, be inserted in the policy; and that the referees erred in receiving evidence by parol, of such an agreement, to defeat the policy; and that their report should have been set aside and a *venire de novo* awarded.

All the members of the court (19) concurring in this result, the judgment of the Supreme Court was *unanimously reversed*.

INTEREST.

FANNING and others, appellants *v.* CONSEQUA, respondent.
On appeal, 17 J. R. 511-524.

3 J. C. R. 587-614.

Rate of Interest on Sales made in Foreign Countries, and Consignments made to Factors in New York ; Lex Loci Contractus ; How far Factor or Agent of Consignee is Responsible for Acts of his own Government, e. g. an Embargo.

THE bill in this case was filed in the Court of Chancery, by Consequa, the plaintiff below, a native merchant of Canton, in China, stating that in December, 1807, he shipped on board a vessel at Canton, a cargo of teas, consigned to the defendants, E. Fanning, H. Fanning, and Willett Coles, to sell for the plaintiff, and which were received by them as his factors. It stated subsequent large shipments down to Nov. 1810, of sundry cargoes of tea, nankeens, &c., consigned to the defendants to sell, and remit the proceeds, and which were received and sold by the defendants. That by an agreement between the plaintiff and defendants, in relation to their receiving and selling the goods so consigned to them as factors, they were to sell the same with all reasonable expedition and for the best prices, and for a reasonable reward to be retained, and to remit the proceeds in specie to Canton ; and for any unreasonable delay, the defendants were to pay 12 per cent. interest, from the time such sales and remittances could reasonably have been made ; that being the rate of interest *where the plaintiff resided*, and where the *contract was to be fulfilled by the remittances*. Prayer, that the defendants be decreed to come to a full account, and to pay what shall be found due to the plaintiff, &c.

It was also charged in the bill that the defendants, by their agent, one Chase, in January, 1811, gave a promissory note to the plaintiff for \$35,717, at 16 months after date, with interest at 12 per cent., which was the lawful interest at Canton,

and that it remained unpaid; having been given for the goods sold and delivered to the defendants. That in December, 1809, two other agents of the defendants gave a promissory note to the plaintiff at Canton, for \$39,690, at 15 months after date; which note when due, should also bear interest at 12 per cent., and that it was also unpaid, &c.

The defendants in their answer denied a general partnership between them but admitted that they were jointly concerned in shipping, importing, and selling on commission, divers cargoes of merchandize, &c. They stated various matters in defence, and various counter claims, by way of set-off and deduction, which it is unnecessary to detail; the only legal points on which the decree of the Chancellor was *reversed*, in the Court of Errors, being the rate of interest to be charged on the *consignments* to the defendants, after the sales were made, and the proceeds came to the hands of the defendants.

With regard to the Chase note, the Chancellor says, 3 J. C. R. 608:

"The next objection is, that the defendants are charged with Chase's note for \$35,711, or with goods, or with goods sold and delivered, to that amount; "whereas, they ought only to be charged with the same, as for goods *consigned* to them, to be sold for the account of the plaintiff, and that in that way, they are willing to account." The Chancellor then reviews the facts and concludes thus: "But this point need not be pursued farther; for the petition for a rehearing admits that the defendants are responsible for the goods to the amount of the note, as for a *consignment*; and if instead of a consignment, the act ought to be deemed a sale, then there is an end of the question."

Upon this point, Platt, J., who delivered the only opinion in the Court of Errors, concurs with the conclusion of the Chancellor; and that part of the decree was accordingly affirmed, which allowed interest on the amount of the Chase note, according to the rate in China. He says;

"I also fully concur with the Chancellor, that the cargo of goods shipped in the 'Chinese,' and for which Chase gave a note, as agent for the appellants, must be deemed as goods sold and delivered by Consequa to them at Canton. Even

admitting that Chase had no previous authority to make such a purchase, or to give such a note on their account, yet as they actually received and converted the goods with full notice that they were sent by Consequa as goods sold, they are justly charged with the amount, according to the invoice price; and with interest according to the rate allowed in China; the contract of purchase having been made there; and the price payable there."

In regard to the rate of interest on the rest of the consignments, the Chancellor decided as follows:

1. "The defendants claim the difference between 10 per cent. per annum, under the agreement which they set up, and the legal interest of this country, on certain notes, the amount of which they were prevented from remitting for one year, by reason of the embargo. The solid objection to the claim is to be found in the principle declared in *Conway v. Gray*, 10 East, 536, *that in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government, and he is as much incapacitated from making the consequences of an act of his own state, the foundation of a claim to indemnity upon a foreign subject, as he would be, if such act had been done immediately and individually by himself.* Lord Ellenborough said, that this same principle was established in *Touteng v. Hubbard*, 3 B. and P. 291, and indeed, we find the principle declared in every period of the *English* law, that every subject is to be deemed a party to the laws of his own government. Bro. Abr. tit. Parliament, pl. 41. Dyer 236, pl. 148, 9 Co. 107, a. Lord Mansfield in *Wadham v. Marlowe*, cited in 8 East. 314, n. The force of this doctrine must be specially felt and acknowledged in this country, where the acts of the government are practically, as well as theoretically, the act of the representatives of the people."

2. "Another ground for rehearing is, that by the decree the defendants are charged, on notes and goods sold and consigned, with interest at the rate of 12 per cent. per annum, whereas, the defendants ought not to be charged, in the case of consignments, where the contract was made here, with any greater interest than the lawful interest of this state."

"The answer to this objection is, that it is an acknowledged rule, that interest must be paid according to the law of the country where the debt was contracted and to be paid, and not where it is sued for. The cases cited by the plaintiff's counsel show this. The principle is entirely applicable to the case of consignments. The plaintiff consigns a shipment to the defendants, and the cargo is received at Canton by the agent of the defendants on their behalf. Canton is then the place where the contract is made, and Canton is the place where the debt is to be paid. The defendants admit, in all the cases of cargoes consigned to them, that they were to receive and remit the proceeds; and the interest for which they are chargeable, is upon the sum which ought to have been remitted, and to be computed from the default. There is no difference in principle, as to this point, between a sale and a consignment. The contract is equally made, and the debt equally to be paid in China, in the one case as in the other; and if we should deny to the Chinese merchant, his own legal rate of interest on such contracts, we should be doing him an injustice which he would not meet with from the commercial part of Europe. To refuse to enforce such foreign contracts, as to interest, say the English books, would put a stop to all trade."

Upon appeal from this decree, the Court of Errors *reversed* so much of it as relates to the rate of interest on the cargoes, except that included in the Chase note.

Platt, J., says:

"The other cargoes have been properly considered by the Chancellor, as consigned to the appellants, as general commission merchants, under a contract on their part, to sell the goods for account of the consignor, and to remit the nett proceeds."

"But in allowing interest according to the law of China, on such nett proceeds, it seems to me, his honor, the Chancellor, has *erred* in his application of the rule of *lex loci contractus*."

Mr. Justice Platt then examines the rule as laid down by Huberus, (*de conflictu legum*, v. 2, b. 2, tit. 3.) Also the English and American cases on the subject. *Champaut v. Lord Ranelagh*, Pr. Ch. 128; *Robinson v. Bland*, 2 Burr.

1077; *Thompson v. Ketchum*, 4 J. R. 285; *Smith v. Smith*, 2 J. R. 235; *Ruggles v. Keeler*, 3 J. R. 263; *Emory v. Greenough*, 3 Dall. 369; *Van Schaick v. Edwards*, 2 J. C. 355.

"In *Elkins v. E. J. Company*, 1 P. Wms. 395," Mr. Justice Platt observes, "cited by the Chancellor, it was decided, that for a tortious sale of the plaintiff's ship in *India*, (by his agent there,) to the defendants, they should account for the value in *India*, with 12 per cent. interest, according to the laws of that country, deducting only the charge of remittance to *England*, where the remedy was sought. But that cause bears a marked distinction from the one now before us; because, in that case, the whole transaction took place, and the entire cause of action arose in *India*."

"There is no doubt of the rule laid down by the Chancellor; "that interest must be paid according to the law of the country where the debt was contracted and to be paid." He says, "in this case, the plaintiff consigns a shipment to the defendants, and the cargo is received at *Canton*, by the agent of the defendants on their behalf; *Canton* is then the place where the contract is made; and *Canton* is the place where the debt is to be paid."

"With great respect, it seems to me, that his Honor the Chancellor did not advert to the important consideration that by the terms of the contract so made at *Canton*, *the goods were to be brought to New York*, not for the account and at the risk of the consignees, but to be sold *here*, by them, as factors or commission merchants, who were to remit the nett proceeds to the consignor at *Canton*."

"Here the words of Huberus apply '*contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit*.'"

"I apprehend it is not the case of a *debt contracted, and to be paid at Canton*. The contract was made *there*, but it was to be executed *here*. The parties had express reference to this country, as the theatre of operations under the contract. Consequa had a right (and he exercised it in part,) of drawing for and receiving the nett proceeds at *New York*, at any time before they were remitted; or he had a right to direct the mode or channel of remittance, provided it was not unlawful.

"Hence, I infer, that the contract did not oblige the consignees to pay the avails of the cargoes to Consequa at Canton. On the contrary, this country was the only sphere of their duties; the *res gesta* was *here*, and they were not bound to do anything but with a reference to our own laws."

"Whether the *American embargo* furnished any excuse for not remitting the nett proceeds of the consigned cargoes, on the amount collected on the note, (sent to the defendants for collection,) so as to bar the claim for interest during the time in which it was unlawful to make such remittances, is a question, which I think does not arise in the case. The appellants have laid no foundation for such exemption; because, for aught that appears, they had the *use* of the money during the embargo; and therefore ought to pay interest for it. If they had kept that money distinctly, as a *deposit* for Consequa, then the question would have arisen, upon which I forbear to express any decided opinion."

"In regard to the debt due *for goods sold* to the appellants, I have no doubt the law is, as stated by the Chancellor, to wit; 'that in questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government and he is as much incapacitated from making the consequences of an act of his own state, the foundation of a claim to indemnity upon a foreign subject, as he would be if such act had been done immediately and individually by himself.' *Conway v. Gray*, 10 East. 536. But I am not prepared to say, that an omission to perform the office of an agent or commission merchant, where the law forbids his acting in that capacity, would subject the factor to the same hard rule. *The absolute debtor* contracts in his own right, for his *own exclusive* benefit, but the consignee is the mere agent or servant of the consignor, acting here, chiefly for the benefit, and at the risk of the principal, and as his representative. It, therefore seems to me, *very questionable*, whether the acts of his government ought to be imputed to the agent, in a question between him and his principal."

"Upon the whole case, therefore, my opinion is, that the decree ought to be *reversed*, to the end that in restating the

accounts between these parties, the appellants be charged with interest at the rate of 7 per cent. instead of 12 per cent. per annum, on the nett proceeds of the goods consigned to them to be sold for the account of the respondent."

This being the unanimous opinion of the court, it was decreed accordingly.

JUDGMENT CREDITOR.

HUNTINGTON and Another v. FORKSON, 6 Hill, 149.

In S. Ct. reported 7 Wend. 463, under the title of *The People ex rel. Rosskrans v. Haskins, Sheriff of Rensselaer*, on application by judgment creditor who had offered to redeem lands sold, for a *mandamus* to sheriff to deliver a deed, &c.

Judgment Creditor's right of Redemption of Lands sold under execution ; Whether "a Rent Charge with Clause of Distress" may be sold on Execution ?

UPON the original motion for a *mandamus* on behalf of the redeeming creditor, the Supreme Court held at the special term, Nov. 1831, that he was entitled to a *mandamus* to the sheriff to deliver a deed. Mr. Justice Sutherland, presiding, decided as follows :

1. A rent charge, that is, a rent reserved upon a *lease in fee*, containing a *clause to enter and distrain for rent*, is an *interest in land* which is bound by a judgment and may be sold on execution as real estate, and forms a *specific portion* of the premises on which it is charged ; a *rent seck* is not such an interest.

2. The provisions of the Revised Statute by which a creditor whose judgment is a *lien* on a *specific portion only* of any lot or tract of land sold, *may redeem the whole*, applies as well to sales made before, as since those statutes went into operation.

3. If a deed has been improvidently executed to the purchaser, and a sheriff is subsequently directed to execute a

deed to the redeeming creditor, the court will not direct the first deed to be cancelled, but leave the creditor to enforce his rights as he shall be advised. A *mandamus* was granted accordingly, Mr. Justice Sutherland observing—"We never order a deed to be cancelled, given under such circumstances. It may be questionable whether the court have authority to make such an order."

The question of the right of Rosekranz to redeem was afterwards brought before the Supreme Court upon a special verdict in this action of ejectment, in which the purchasing creditor, Huntington, and Payne, the debtor in the judgment under which Huntington bought were plaintiffs, and Forkson, the tenant, defendant.

That Court held, as before, that Rosekranz had the right of redemption and rendered judgment against the plaintiffs for the reasons stated in their opinion on the foregoing motion for the *mandamus*. Huntington and Payne thereupon brought error. 6 Hill, 149—150.

The Court of Errors held as follows:

1. Under the Act of 1820, relating to the redemption of lands sold on execution, a creditor whose judgment was a lien on only a *part* of the premises sold, acquired no right to redeem the whole.

2. The provision in the Revised Statutes giving this right applies only to sales made after the first of January, 1830, and was not intended to operate *retrospectively*, so as to interfere with purchases previously made; and the lands in question having been sold on execution in October, 1829, a judgment creditor, whose lien extended only to a *portion* of the property sold, and who sought to redeem the whole under the Revised Statutes, had no such right of redemption."

As to whether a *rent-charge* reserved upon a lease in fee can be sold on execution as *real estate* and redeemed by a judgment creditor, the two Senators who delivered opinions declined to examine the question.

JUSTICE'S JUDGMENT.

NOYES v. HEWITT. 18 Wend. 141.

Reversal of Justice's Judgment by Common Pleas on Certiorari ; of Judgment of Common Pleas and Supreme Court by Court of Errors ; Jurisdiction of Supreme Court in such Case on Question of Fact before Justice ; Defendant Discharged, called as Witness.

ERROR from the Supreme Court. *Trespass* originally for the taking of a horse. The question in the case was whether the horse belonged to Hewitt or one Lane. When the plaintiff rested, no evidence having been given connecting Noyes with the taking, it was moved on that ground, that he be discharged from the suit, he being the plaintiff in the execution under which the property had been taken. The justice accordingly *discharged* him, instead of directing the jury to find a *verdict* in his favor. *Noyes* was then sworn as a witness, and from the evidence given subsequent to his discharge, it appears that the horse was sold under the execution and that he purchased him, and that the amount was applied on the execution. The case was submitted to the jury who found a verdict of "no cause of action," on which the justice entered judgment against the plaintiff for the costs of suit. On certiorari to Orleans Common Pleas, the court reversed the judgment of the justice and gave judgment for costs against both Noyes and Pettingell the other defendant, who brought writ of error to the Supreme Court, which affirmed the judgment of the Common Pleas in the following pithy opinion. *Per* Nelson, J.

"The subject of the dispute was a horse. The jury must have found that the plaintiff Hewitt was *not the owner*. The Common Pleas held he was the owner. If this be considered a question of *fact*, the judgment of the Common Pleas must be affirmed ; and if a question of *law*, then I think they were right. So that in either view, the judgment must be affirmed."

But the Court of Errors held that as there was *evidence* on *both* sides, though very slight on one, a court of Common Pleas is not authorized on *certiorari* to reverse the judgment ; although such court may arrive at a very different conclusion upon the *weight* of evidence."

"That a court of Common Pleas may, however, reverse a judgment of a justice where there is no evidence or a material defect in the proof ; or where there is a recovery for a totally different cause of action from that laid in the declaration, or where the demand recovered is manifestly illegal," also "That the Supreme Court is not concluded by the judgment of a court of Common Pleas in a *certiorari* cause from reversing the judgment of that court on the assumption that such judgment was rendered on the facts of the case and therefore not the subject of review by the Supreme Court ; that, on the contrary, where the Common Pleas reverse a judgment of a justice *without any assignable cause* it is *erroneous*. *Whitney v. Sutton*, 10 Wend. 413, and *Columbia Turnpike Co. v. Haywood*, id. 435, are *contra* and overruled by this case."

The discharge of the defendant by the justice instead of directing the jury to find him "not guilty," was held no cause of reversal, though the Chancellor says : "It is probable he erred, in point of form, in this respect." But he says : "*It was a mere technical error* ; and he argues that it was no ground for reversing the judgment as to Noyes, on that account, as the statute in terms directs "that the court of Common Pleas shall disregard mere technical omissions, imperfections, or defects in the proceedings before the justice." 2 R. S. 257, § 181. He then says : "The evidence given after Noyes was discharged, as he was then no longer a party to the suit, was not evidence on which the Common Pleas could reverse the judgment as to *him*."

LANDLORD AND TENANT.

DYETT v. PENDLETON, 8 Cow. 727.

In S. Ct. 4 id. 581.

Landlord and Tenant ; Eviction ; Nuisance ; Rent.

THE Supreme Court in this case, held that a plea of eviction, which alleged "that the landlord was guilty of a nuisance in bringing lewd women near the premises demised, and under the same roof, by which the tenant and his family were broken of their rest and otherwise, so much annoyed that they were obliged to leave the demised premises, and keep away on that account," was bad on general demurrer, and was not a legal bar to the landlord's recovery for rent; that although an eviction by the lessor of any part of the demised premises, was a good plea in bar, the facts set up in this plea did not amount to such an eviction.

The Court of Errors *reversed* the judgment of the Supreme Court, upon the ground that such "nocturnal noises and disturbances, and the abandonment of the premises by the tenant," were evidence *to go to a jury, under a plea of eviction of tenant by the landlord*, in an action for the rent; and that the jury might upon such evidence, be authorized in finding the plea of eviction to be true; and that if the facts were found as alleged in the plea, the lessor would thereby be barred of his rent, as on an actual and physical expulsion of the tenant by the lessor.

Judgment *reversed* accordingly.

BENSON v. BOLLES, 8 Wend. 175.

Not reported in S. Ct.

Landlord and Tenant ; Collusive Surrender.

IN this case, a *landlord* demised premises for one year, to a tenant at a specified rent, and agreed that if he continued to occupy them for seven years at the same rent, he, the landlord, would pay him \$50, for money laid out in repairs ; and a *sub-tenant* of the lessee, *surrendered the premises to the landlord fourteen days* before the expiration of the seven years, paying him the rent up to that day.

The Supreme Court held that the lessee could not recover the \$50 expended in repairs. But

The Court of Errors held, that the landlord, for the residue of the term, 14 days, must be considered a *quasi* sub-tenant to the original lessee, and at the expiration of the seven years, was liable for the \$50 agreed to be paid for repairs.

Judgment reversed 10 to 9.

STONE v. MATTHEWS, 7 Hill, 428.

In S. Ct. 1 Hill, 565.

Landlord and Tenant ; Right of Distress on Property of Boarder in Boarding-House.

IN this case the Supreme Court held that where the property of a boarder at a boarding-house, was not in the possession of such lodger or boarder, but in the possession and actual use of the tenant of the boarding-house, by the owner's permission, and without the consent of the landlord, the property was not exempt from distress.

But the Court of Errors held, that the judgment was erroneous, and a *resolution* was offered and passed on the reversal, as follows : "Resolved, that property of boarders at taverns and boarding-houses, is not liable to distress for rent although such property is not in their possession, but in the

possession and actual use of the tenant, by their permission, and without the consent of the landlord."

This resolution was adopted by a vote of 15 to 7.

✎ The question arose under the statute 2 R. S. 413, 2d Ed. § 15, which excepts from distress *the property of boarders at taverns and boarding-houses*. The Supreme Court held that this exception embraced only the "property in use by him as a boarder."

LEASE.

ADAMS v. HULL, 2 Denio, 306.

In S. Ct. 1 Hill, 601.

Lease; Assignee.

THE plaintiff being the assignee of a lease, and bound by covenant to pay the rents, &c., to the lessor, assigned the lease to the defendant by writing, expressing a consideration of three thousand dollars; whereupon the defendant executed a covenant to the plaintiff to pay the rents, &c., and at the same time gave the plaintiff two notes, under seal, one for \$2,000, and the other for \$1,000. This was an action of *covenant* upon the *first note*; and the defendant offered to prove by parol, that the other note was given as collateral security for the rent, and that he had paid it at its maturity, and that he had been afterwards compelled to pay the *rent* for a like amount to the lessor to avoid a distress; which \$1,000 he now sought to set off against so much of the plaintiff's demand on the other note.

The Supreme Court held the parol evidence inadmissible, but

The Court of Errors *reversed* the decision, holding it competent for the defendant to prove by parol the *considera-*

tion of the second note, and thus lay a foundation for the set off *pro tanto*, against the plaintiff's demand.

Reversed 11 to 5.

CARTLEDGE and another *v.* West, 2 Denio, 377-379.

In S. Ct. 5 Hill, 488.

Landlord and Tenant ; Assignee of Lease.

IN this case, the Supreme Court held that the landlord may recover under a count, upon an *insimul computassent*, though the evidence be of an accounting for rent *secured by deed*.

The Court of Errors, without passing expressly on this point, held that where the defendant was the *assignee* of the lessee under an assignment in trust for creditors, and the promise upon the accounting was "*to pay when he should receive funds from the assigned property*," and there was no proof that he had received such funds, the plaintiff could not recover.

The judgment was accordingly unanimously *reversed*.

DUFFIELD and others *v.* WHITLOCK, 26 Wend. 55-62.

Reported 1 Hoffman Ch. R. 110. Not reported in Paige.

Lease ; Covenant for Appraisement and Renewal.

THE lease in this case contained a covenant, that "at the expiration of the term, the buildings should be appraised, and that the lessors should pay the tenant the appraised value, or grant a new lease for twenty years, upon such terms as he *might think proper*, and as *might be approved by the lessee*; and in case the lessee should not approve of the terms offered, that he should have the right to remove the buildings within three months after the expiration of the lease." After the expiration of the term, the parties appointed appraisers by an instrument in writing and under seal, *by which they agreed to stand to and abide and perform*

the appraisement to be made under and pursuant to the covenant in the lease. The appraisement being made, the lessor tendered a lease to the lessee, but at a rent grossly disproportioned and exorbitant, which the lessee declined to accept, and filed his bill, alleging the lease tendered to have been collusively offered and not in good faith; and praying that the lessors might be decreed to pay the value of the buildings as appraised or to be appraised, and for a new lease, &c.

The Assistant Vice Chancellor of the first circuit, held, that though the complainant by the terms of the lease, was not entitled to demand a renewal, yet that by the *submission to the appraisers, a new agreement* had been entered into, and he decreed the sum found by the appraisers, to be paid to the lessee. On appeal,

The Chancellor held that there could be no decree for a new lease; but he differed as to the effect of the *submission*, holding it to be no new agreement; but he also held that as the lessors had not tendered a lease according to the *spirit of the covenant* in the lease; the lessee was entitled to be paid the appraised value of the buildings; and he *affirmed* the Assistant Vice Chancellor's decree.

The Court of Errors held, on the other hand, that though the covenant for a new lease was too vague and indefinite to authorize a new lease; that the offer of a new lease, though at an exorbitant rent, released the lessor from all covenants in the lease, except to permit the removal of the buildings, and consequently that he was not liable to pay the *appraised value*. Decree reversed.

For reversal 13, for aff. 5.

LEGACY.

PATERSON v. ELLIS, 11 Wend. 259.

Opinion of Chancellor, id. 265.

Legacy, Vested or Contingent.

APPEAL from Chancery.

Ellis, the testator, directed by will made in 1811, in which year he died, that immediately after his decease, the sum of \$20,000 should *be placed at interest in the name of his infant daughter, E. E.*, either on public or private securities, and that the interest or income thereof should be received by his executors as the guardians of the estate of his daughter during her minority, and \$500 of the interest to be paid annually to his wife, to be appropriated to the daughter's education and maintenance, unless she should marry before she arrived at full age, in which case the whole of the *interest to be paid to her*. The residue of the interest over the \$500, to be invested, and then that the "*whole of the said principal sum, together with the accumulation of the interest thereon, be at her free and absolute disposal, after she shall attain the age of twenty-one years ;*" if she should die before attaining twenty-one, leaving lawful issue,—her issue to be entitled to the portion before "*given to his daughter Emily, provided she shall attain the age of twenty-one years ;* if one, the whole ; and if more than one, share and share alike."

But if she died *before twenty-one, "and without leaving lawful issue,"* then, principal and interest to be distributed as he had provided with regard to the residue of his estate. Cross remainders are subsequently created between his sons and daughters in case of any dying before their shares vest, *without leaving lawful issue*.

The Chancellor held the legacy not vested, but contingent.

The Court of Errors held that the legacy of \$20,000, with the interest was a *vested legacy* ; that the limitation over in favor

of the residuary legatees, was "contrary to law, and void," as expressed in the decree. And the reporter adds in his marginal note: "that it was further held, that if the terms of the will conferred only a life interest in the daughter, the subsequent limitation over, being upon an *indefinite failure of issue*, was too remote, and therefore void, as an executory devise."

The opinion delivered by Ch. J. Savage, is a clear and able exposition of the English and American cases on this subject.

He says: "My conclusions upon the whole case are these:

"I. That the legacy of \$20,000 and its interest became vested in the legatee, because, 1. It was separated from the estate of the testator. 2. It was invested in the name or for the benefit of the legatee. 3. The testator appointed guardians to manage his daughter's estate. 4. The interest was given to her use. 5. It is to be paid at 21, and be at her own absolute disposal.

"II. That the legacy having vested, it was not divested by the limitation over, because the absolute property passed by the will; it was not given to the legatee for life, but to be at her own free and absolute disposal, after she shall attain the age of 21 years.

"III. If, however, the will gives E. E. only an estate for life in the first part of the clause, the subsequent limitation over being upon an *indefinite failure of issue*, is too remote and therefore void as an executory devise."

The Chancellor in his opinion, (contained in the report,) fully admits that the *separation of the legacy from the mass of the estate, &c.*, rendered it a vested legacy in the daughter, payable at a future day; but subject to the limitation contained in the latter clause of the bequest." p. 265.

Decree of Chancellor *reversed*; 3 judges and 12 senators for *reversal*, 9 senators for *aff.*

LIBEL.

THORN v. BLANCHARD, 5 J. R., 508.

Not reported in S. Ct.

Libel ; Privileged Communication.

THIS was an action for a libel contained in a petition to the council of appointment, praying the removal of the plaintiff from an office he held under the council, and preferring certain charges, in words admitted to be actionable in themselves, and *false*.

The Supreme Court held the communication not a privileged one, and that an action was sustainable for such an abuse of the right of petition. The Court of Errors *reversed* the decision ; the court held, that no action will lie for charges against a public officer, contained in a petition to the appointing power praying his removal from office, although the words used in the petition are false, and actionable in themselves, *without proving express malice* ; or that the petition was *actually malicious and groundless*, and presented merely to injure the plaintiff's character.

It would seem necessary, therefore, in a declaration for such a libel, to *aver express malice*, and the *groundlessness* of the charges, and that they were presented merely to injure the plaintiff's character.

The reporter adds a *semble* to this case, which does not appear to be authorized by any thing in the decision as reported ; as follows :

" *It seems*, that where a person addresses a complaint to persons competent to redress the grievance complained of, no action will lie, whether his statement be true or false, or his motives innocent or malicious."

SPENCER v. SOUTHWICK, 11 J. R., 573.

In S. Ct. 9 J. R. 314, and 10 J. R. 259.

Libel ; Pleading.

IN a declaration for a libel charging that "by hypocritical cant, &c., the plaintiff and his associates, effected the incorporation of the Manhattan Bank, in which the plaintiff's share of the profits was several thousand dollars; and that the plaintiff, as a member of the senate, advocated the bill entitled "An act for supplying the city of New York with pure and wholesome water," knowing "that it contained a clause authorizing the company to carry on banking business, and when he knew that the other members of the legislature were ignorant of the fact, &c." The defendant pleaded in justification, that the plaintiff was a senator on the 2d of April, 1798; that such a law was passed, and averred that at the time of passing the law, the plaintiff as senator advocated and supported the bill, knowing at the time, that it contained such clause, &c.; and that a large majority of the members of the legislature were ignorant of that fact, &c.; and that at the time and place first mentioned the plaintiff held and was owner of a large portion of the stock created by the said law, to wit: \$5000; all which acts of the plaintiff's were hypocritical and deceptive, and contrary to his duty as a senator, &c." The plaintiff replied: "That at the time he advocated the said law, as senator, he did not hold and was not owner of any stock," &c. On a general demurrer to this replication, the Supreme Court held it to be bad. But, on error, the Court of Errors held that the *plea* was also bad, as not being an answer to the declaration, and the defendant having committed the first fault in pleading, the plaintiff was entitled to judgment.

Judgment *reversed* accordingly.

RYCKMAN v. DELAVAN, 25 Wend. 186.

In S. Ct. 17 Wend. 49.

Libel ; Pleading.

ACTION for a libel stating that "certain *malting establishments* on the hill in Albany, (owned by particular individuals but not naming the plaintiff,) *were supplied with water for malting from stagnant* pools, gutters, and ditches, often in such a state as to be green on the surface," and that there were several malting houses on the hill, all of which relied on water taken occasionally from such places." The plaintiff alleged in his declaration that he was a maltster and brewer at a place in the city of Albany called the "Hill," and that to *injure* him in his good name, and to *destroy* his *business*, the defendant published the libel. The plaintiff put in a general demurrer, and assigned as cause of demurrer, that *special damage* was not alleged.

The Supreme Court *held* that the publication was *libellous*, and that it was not necessary to allege special damage to sustain the action ; but they also held that an action does not lie for a *libel* for a publication alleged to effect the *individual characters* of persons and the *trade* or business carried on by them, if on its face it does not point at the *individuals* intended, otherwise than that they pursue a particular trade or business in a specified section of a city ; the publication affecting a *class of persons*, no *individual* of that *class* is entitled to sustain an action for the publication.

The Court of Errors *held*, however, that an action may be sustained for such a libel, by an *individual* for an injury to his business, unless it be manifest upon the face of the publication that the charges were made against a class of society, a particular profession, an order or body of men at large, and can not, by possibility, import a *personal application* tending to produce private injury.

The case of *Sumner v. Buel*, 12 J. R. 465, denying the right of an individual to maintain an action for a libel affecting a *class of persons*, without alleging special damages, *questioned*.

Judgment *reversed* ; 10 for rev., 9 for aff.

DOLLOWAY v. TURRILL, 26 Wend. 383—403.

Reported in S. Ct. 17 Wend. 426.

Libel; What are Questions for Jury.

THE libel complained of in this case charged Turrill, the plaintiff below, who was first judge of the county of Oswego, and as mentioned in the libellous publication, addressed "to the public," then "a candidate for the office of member of Congress" with having put his official signature as first judge to a statement in writing in the form of an affidavit, stating under his hand that the person who signed it was *duly sworn*, when, in truth, the said person was not sworn at all;" it also asserted that the paper thus certified "was intended to prevent the appointment of the present collector of Oswego, and that T. made himself, secretly, as he supposed, busy in concerting measures to produce that result. It then continued: "We leave the public to judge under the circumstances whether Judge Turrill has not committed a gross violation of his oath of office, for the purpose of ruining a man whom he has long endeavored to injure, although he belongs to the same political party with himself." This publication was signed by the defendant and some others, and published in a newspaper Oct. 25th, 1832. The plaintiff in his declaration stated that he was first judge &c. at the time the alleged act took place and the defendant *intending to cause it to be believed that he, in his office of first judge, had conducted himself in a corrupt and criminal manner*, and was destitute of official purity, and judicial integrity; caused the publication to be made, alleging that it was false, scandalous, &c.

The defendant pleaded the general issue, and accompanied it with a notice that he would prove on the trial of the cause the facts as set forth in the publication; adding, "And that the publication was made with good motives and for justifiable ends: to wit: to inform the electors of the congressional district of the facts detailed therein, and that all the matters alleged in the declaration to be libellous, were true."

The cause was tried in Dec. Ter. 1838, a second time before Gridley, circuit judge, at the Oswego circuit, when after

the evidence of publication, and that the defendant was worth \$30,000, the plaintiff rested.

The defendant then offered to prove the facts specified in his notice; to which proof the plaintiff objected, "On the ground of the insufficiency of the notice, and also that the facts stated in the notice, in regard to the charge as to the affidavit, did not amount to a justification of that charge." The evidence was rejected. The defendant then offered to prove "That the plaintiff did the several acts specified in the publication corruptly and with the intent and motive alleged in the declaration to be charged against him—which was also objected to and rejected. The counsel for the defendant then requested the judge to charge the jury that they *had a right to decide in what sense the words in the publication were used*; that is, whether they imported a charge of *inadvertence* on the part of the plaintiff in certifying that he had sworn the person to the affidavit, when he had not administered any oath; or whether they imported *official corruption* in the plaintiff; and if the jury should find that they were used in an innocent sense, then that they were not actionable. But the judge declined so to charge; and told the jury, "That any written or printed publication charging an individual with a want of integrity or with corruption in office was actionable; that the act here charged was one which not only would imply a want of integrity, but amount to an unequivocal charge of official corruption, and which if true would render him unworthy of his judicial station, and of the suffrages of his fellow citizens for that for which he was then a candidate; that the Supreme Court had already passed on the construction of the libellous article then in question in accordance with these views and had determined that the paper was not susceptible of an innocent construction, but was libellous in its character, and it would therefore be their duty so to consider it in their verdict. The only other question," he further said, necessary for them to consider was whether the plaintiff had been guilty of publishing the libel in question, and left that to them upon the evidence. The jury returned a verdict for the plaintiff with \$800 damages. The decisions upon the evidence and the charge of the judge being excepted to, the defendant upon his bill of

exceptions, moved the Supreme Court for a new trial, which was denied. The opinion of the court was delivered by Nelson, Ch. J., who, after stating that the fact of publication was sufficiently proved, says: "After this it was entirely competent to admit evidence of the circulation in other papers besides those specified in the declaration. A party putting a libel in circulation is answerable for the extent that may be given to it. The notice did not amount to a justification. The import of the libel was determined by this court on the former motion for a new trial, 17 Wend. 426; and it has now been tried in conformity to the principles there laid down. It is impossible to interfere with this verdict without overruling the views there taken, of the correctness of which we have seen no reason to doubt." The defendant then sued out a writ of error to this court.

The Court of Errors *held* that the charge of the judge as *matter of law*, that the *publication was libellous and not susceptible of an innocent construction* was erroneous, and that, instead thereof, the question, *in what sense the words were used?* should have been submitted to the jury.

The Chancellor read an opinion in favor of an affirmance: (not published.) Senator Root having maintained in an opinion read by him, that the provision in the Constitution that "*In all prosecutions or indictments for libel, the truth may be given in evidence to the jury,*" extended to civil actions also; and Senator Verplanck, intimating that his impressions concurred with that opinion, the Chancellor protested against the decision of the case upon grounds not presented on the argument, and upon which the plaintiff below had not been heard by counsel. He expressed his surprise that such a construction should be attempted to be given to the constitutional provision, and would "venture to say that no lawyer had ever before supposed it extended to *civil suits*;" that to extend it to them would operate unfavorably to the defendant; that at common law the truth of a libel, be the motive ever so bad or the end ever so unjustifiable, if the facts are properly pleaded or set out in a notice, may be given in evidence in civil suits for libel; but that if the provision in the Constitution should be extended to civil suits, the

truth will no longer be a justification, unless published, with "good motives and justifiable ends."

Judgment *reversed* (it would seem only on the ground that the jury had a right to pass upon the *sense* of the words,) by a vote of all the members present for *reversal* except the Chancellor and three senators who voted for affirmance.

§ The constitutional provision above referred to, is *amended* by the present Constitution of the state of New-York, to read as follows: Const. of 1846, art. 1, sect. 8, "In all (*criminal*) prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

STONE *v.* COOPER, 2 Denio, 293—306.

Not reported below. See opinion of S. Ct., per Cowen, J., 2 Denio, 295.

Libel; Pleading.

THE plaintiff below declared upon the following libel published by defendant. "Mr. J. Fennimore Cooper need not be so fidgetty in his anxiety to finger the cash to be paid by us toward his support. It will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period. Wait patiently; there will be no locksmith necessary." On demurrer:

The Supreme Court held, that the allusion to the locksmith, the *nature of it not being stated* in the inducement, did not render the publication libellous; but that the part of the article representing the plaintiff as anxious to get the money to use it in *shaving*, was libellous. That the libel implied that the plaintiff was in the habit of *shaving*, which they held to mean, in common parlance, *usury*. The defendant brought a writ of error.

The Court of Errors *held*, that for want of a proper in-

ducement the publication in that respect, was *not libellous*, and held the declaration *insufficient* also as to the allusion to the locksmith.

Judgment *reversed* on the latter point *only*, 15 to 5.

LIEN.

BRYCE and RENNIE v. BROOKS, 26 Wend. 367 to 382.

S. Ct. Reported in Sup. Ct. 21 Wend. 14.

Lien of Factor of Purchasing Agent, who had Advanced Purchase Money.

THIS was an action of trover by B. and R. against Brooks, in the New York Superior Court, for a quantity of *rollers* for printing calicoes.

In September, 1833, Brooks at the request of B. and R., sent an order to his correspondent at Manchester, to have a quantity of rollers prepared and sent to him with all possible dispatch, and on the 15th of October, a similar order. The first quantity was accordingly sent and arrived in New York in February, 1834. On the 11th of March, B. and R. gave B. a draft at 4 months, on a house in Philadelphia, for \$1,623, the *cost of the first parcel*, and Brooks gave a receipt for it on the invoice, specifying that when paid it would be in full for the invoice. The second parcel arrived about the time of giving the draft, but whether before or after, did not distinctly appear. The cost of the second parcel was \$134; both were paid for in England by Brooks. After receiving the draft, Brooks refused to deliver the first parcel, *unless security was also given* for the second. The demand was made previous to the 20th of March. The works of R. and B., for which rollers were intended, were destroyed by fire on the 24th of March, whereby they became insolvent. The draft for \$1,623, was paid at maturity, but before it fell due, viz.; in June, this suit was commenced. The Chief Justice of the New York Superior Court, charged the jury, that at the *time of the demand*, the property of the first parcel of rollers was vested in the plaintiffs, and that the defendant had not such

a lien upon it as to entitle him to retain it; and that the refusal to deliver it, being evidence of conversion, the defendants were liable in trover. Verdict for plaintiffs, and charge excepted to.

On writ of error, the Supreme Court *reversed* the judgment, and awarded a *venire de novo*; holding that the defendant Brooks, had a lien for the general balance due to him from plaintiffs, and did not waive it by taking the draft. On error to this court,

The Court of Errors held, that the importer, Brooks, by delivering the *invoice* of the *first* parcel to his principal, and accepting his draft for the amount payable at a future day, had *waived his lien*, which would otherwise have existed on the first parcel for the price of both, and that an action of trover lay against him to recover it.

The Chancellor delivered a brief opinion for *affirmance* of the judgment of the Supreme Court, holding that the question of waiver should have been submitted to the jury, that *from the form of the receipt*, it may be questioned whether the defendant did not retain his lien. But the court by a vote of 15 to 7 *reversed* the judgment.

M'FARLAND v. WHEELER, 26 Wend. 467.

In S. Ct. 10 id. 318.

Lien; Waiver of.

REPLEVIN for a quantity of boards sawed by the plaintiffs at their sawmill for one Vaughan. It was agreed that the plaintiffs below should have \$2 25 for 100 pieces, and a lien on them till paid. It was further agreed that V. might pile the boards on the bank of the Champlain canal, about half a mile from the mill, the plaintiffs' lien, however, to remain the same as if piled in the mill-yard. The plaintiffs having sawed 14,000 pieces, Vaughan took away a boat load, with the assent of the plaintiffs, from the canal bank, and afterwards, two other boat loads, from the same place, without their knowledge or consent. An execution was levied by the sheriff of Washington county, defendant, upon the lum-

ber remaining on the bank of the canal, about 8,000 pieces, as the property of Vaughan, and being advertised for sale and the deputy sheriff refusing, after notice of the plaintiffs' claim for sawing the 14,000 pieces, which was proved to be unpaid, to regard their claim, this suit was brought and the property taken upon it. The Supreme Court, upon writ of error to the Court of Common Pleas of Washington county, where the suit was originally commenced, now affirmed the judgment of that court, in favor of the plaintiffs below, merely referring to their former decision in 10 Wend. 318, holding that the plaintiffs' *lien* remained notwithstanding the removal of the property to the bank of the canal: and extended to *all boards and lath*, as well those which had been removed with, as without the plaintiffs' assent. On writ of error to this court,

The Court of Errors held, that by the removal of the boards to the bank of the canal, the plaintiffs lost their lien in *respect to third persons*; notwithstanding the express stipulation between the parties; though it would seem that the court also held, that if they had been placed in the charge or under the control of a *third person*, with notice of the lien, it would have been considered the constructive possession of the plaintiffs, and would have sustained their lien for the whole amount of their claim for the work done.

The court *reversed* the judgment of the Supreme Court, by a vote of all the members present who heard the argument, except the Chancellor and Senator Paige, who voted for affirmance.

LIS PENDENS.

PARKS v. JACKSON, *ex dem.* HARDWICK, 11 Wend. 442.

1. *Lis Pendens.* 2. *Parties to Suit in Equity.* 3. *Possession; Constructive Notice to Purchaser.*

THE Supreme Court held that this case was decided by that of *Parks v. Andrews and al.* 7 Wend. 152, and that the conveyance to the defendant's vendor, *pendente lite*, was void; notice of *lis pendens* having been filed, on the filing of a bill in Chancery to avoid the deed made by the original owners to the vendors, under whom the tenants claimed, who had entered and made various improvements, and paid off several incumbrances.

The Court of Errors held, on the other hand, that "a purchaser of land who by the terms of his contract has a right to take possession, and has time for the payment of the purchase money, and who takes possession, makes valuable improvements, pays the purchase money, and obtains a deed, is not affected by the rule that a conveyance obtained *pendente lite*, is void; although such purchase money be paid, and a deed obtained *subsequent* to the commencement of a suit in Chancery, against his vendor to avoid his title, as fraudulently obtained; and in which suit a decree is made, adjudging the deed to his vendor to be void in law; such purchaser having entered into the contract under which he took possession, *previous* to the filing of the bill, without *actual notice* of the fraud of his vendor—not having been made a party to the Chancery suit—and independent of the decree, his vendor having had the legal title at the date of the purchase.

Such a purchaser, in *actual* possession of lands *under contract*, and who had made improvements, &c., in pursuance of the terms of his agreement, should be made a party to a bill in equity, filed to avoid the title of the vendor, so that the court may protect the equitable rights of all interested in the lands.

A purchaser at a sheriff's sale is chargeable with *constructive* notice of the equitable rights of a *vendee* of the judgment debtor, and takes his title subject to those rights, where the vendee is in the *actual* possession of the premises, under a contract made *prior* to the attaching of the lien of the judgment.

Judgment accordingly *reversed*, 20 to 1; Walworth, Chancellor, only voting to *affirm*.

LOAN COMMISSIONERS.

SHERWOOD, appellant *v.* READE, respondent, 7 Hill 431.

In Ch. 8 Paige, 633.

Mortgage to, and Authority of Loan Commissioners to Sell.

THE act authorizing the loan of certain monies belonging to the United States, deposited with the state of New York, passed April 4, 1837, authorizes the commissioners to be appointed under it to advertise and sell premises mortgaged to them, in certain cases, and after certain publications of the notice of sale, &c., at the day and place of sale.

The sale in this case was advertised according to the act, for the 1st *Tuesday of February*, '43, and the premises were struck off to the highest bidder, who was required forthwith to comply with the terms of sale by paying to the commissioners then present, the 14 per cent. according to the conditions of sale. He failing to do so, the commissioners on the same day resold the premises, under the notice of sale already advertised.

The owner of the equity of redemption, the appellant, insisted that this neglect of the first purchaser gave him a farther time to redeem under the provisions of the statute, and that the commissioners had no right to put up the property a second time. He accordingly filed his bill in this cause

against the purchaser and the commissioners to restrain the giving of a conveyance pursuant to the terms of sale. The Vice Chancellor refused, after the coming in of the answer, to dissolve the injunction; but the Chancellor dissolved it, *reversing* the order with costs.

The Court of Errors, however, held that the statute having provided that if the purchaser "should not pay for the same, *then and in every such case*, the commissioners shall enter into and take possession of, and let the same until the 3d Tuesday of September, then next, and then sell, &c.;" the statute authority must be strictly pursued, and that on this ground the re-sale was void. They also held, that the terms of sale prescribed by the commissioners, (14 per cent. cash, and 6 per cent. credit,) were not authorized by the statute, which contemplates a *sale for cash* only, and that this departure from the statute also avoided this sale.

Decree of the Chancellor *reversed*, 20 to 1.

MANDAMUS.

THE JUDGES OF THE ONEIDA COMMON PLEAS *v.* THE PEOPLE, *ex rel.* Savage. 18 Wend, 79.

Not reported in S. Ct., but the opinion of Nelson, Ch. J., given 18 Wend. 80—81.

THIS case having been the leading decision in the *reform* said to have been effected by the Court of Errors in the practice of the Supreme Court with respect to issuing the writ of mandamus to correct the errors of inferior courts, we shall give a brief view of the jurisdiction thus exercised before the question came before the Court of Errors in the above cause. That the Supreme Court had, in a few instances, by haste or incaution, granted the writ in cases where it was not the appropriate remedy, may be safely enough admitted, as that court itself hastened to acknowledge it and to "stand corrected" on the point, as Mr. Justice

Bronson expressed it, in the case of *The People ex rel. Doughty v. The Judges of Dutchess C. P.*, 20 Wend. 658. He there said : " It is not to be denied that there had been a gradual departure from the old law on this subject, until this court had, in one instance at least, exercised a jurisdiction by mandamus, as large as that which we now decline. But we stand corrected by the decision of the court of last resort in the case of *The Judges of Oneida v. The People*, 18 Wend. 79." We shall have occasion, in the course of our examination to inquire how far that case required or authorized the court to decline the jurisdiction by mandamus which was solicited in the case of the Judges of Dutchess C. P., and which we shall endeavor to show, was a case not within the reason and true principle of the facts in the *Judges of the Oneida Common Pleas v. The People*.

The cases so far as they are reported, in which the Supreme Court had interfered, to "*correct the errors*" of inferior tribunals, are very few and do not appear to have been very carefully weighed. A few instances may suffice. In *Blunt v. Greenwood*, 1 Cow. 15, the court did interfere by mandamus to correct the *practice* of the Common Pleas of New-York, in setting aside a *fi. fa.* as irregular ; and a mandamus issued to that effect, commanding them to vacate the rule, setting it aside. (See form of writ, 1 Cow. 22.) The question as to the power of the court to correct such an order by mandamus seems to have been very little discussed on the argument, and the opinion of the court does not advert to it. The reporter heads his marginal note with the following : " Mandamus lies to correct erroneous practice of a court of Common Pleas, *except in mere matters of discretion*," but there is no such general claim of jurisdiction nor any such qualification in the opinion of the court. The decision granting the mandamus can only be regarded as an incautious one in the first instance ; at all events, as entirely destitute of authority since the decision in the case of the Oneida judges.

In the case of *Ex parte Chamberlin*, 4 Cow. 49, where a most unprecedented motion was made for a mandamus, to the justices of the General Sessions of the Peace of the county of Oneida commanding them to attach and punish J. C. for *non-attendance* in that court as a witness, the court said :

"They should have denied this motion at once on the ground that it sought for a mandamus to compel an inferior court to punish for a contempt, had the matter rested there; for every court must judge of its own contempts; but as the private rights of an individual were also implicated, they had for that reason looked into the merits," and they denied the motion. In *ex parte Bostwick*, 1 Cow. 143; in *ex parte Bailey*, 2 Cow. 479; in *ex parte Johnson*, 3 Cow. 371; in *ex parte Brown*, 5 Cow. 31; in *ex parte Bacon*, 6 Cow. 392; in *ex parte Benson*, 7 Cow. 363; in *ex parte Coster*, 7 Cow. 523, the Supreme Court refused the writ on the general ground that they had no right to interfere by mandamus with the decisions of the Common Pleas where they had passed upon questions within their judicial cognizance and discretion. *The People v. Chataugue C. P.* 1 Wend. 73, and *The People v. Columbia C. P.*, 1 Wend. 297, are cases where the court declined to grant the writ, although in the latter case, *Savage, Ch. J.* who delivered the opinion of the court, seems to favor the idea, that if affidavits of jurors rejected by the Common Pleas had been improperly rejected, it was "a question of *law* and not of discretion," and therefore a proper subject of review in that court, and a remedy might be afforded by mandamus. This principle was, however, soon after carried into practice in the next case which appears to be the first marked enlargement of their jurisdiction by mandamus, to correct the decisions of inferior tribunals.

THE PEOPLE *ex rel.* E. G. Oelricks v. THE SUPERIOR COURT of the City of New York. In S. Ct. 5 Wend. 114—128.

This was a motion for a mandamus to the judges of the Superior Court of the city of New York, to *vacate* a rule granting a new trial in an action brought in that court in favor of E. G. Oelricks against the Phoenix Bank. The plaintiff sought to recover the amount of a draft for \$2500, deposited with the bank for collection, on the ground of neglect in transmitting the bill to Baltimore, on which place it was drawn. The main question of fact in the case was,

whether the note was left with the bank *before twelve o'clock or after* on Saturday, 30th of May, 1839. Under a charge from the presiding judge "that if they believed the bill had been left *before twelve o'clock*, so that it would be regularly transmitted by the mail, *that day*, according to the rule and usage of the bank, they ought to find for the plaintiff, otherwise for the defendants; the jury found for the plaintiff.

The defendants moved for a new trial, on the ground of *newly discovered evidence*; viz: that of a clerk in the bank at the time, one Russell, who made affidavit that he saw the note deposited, and that it was about *one o'clock* in the day, or rather past. They also produced affidavits of the president and cashier of the bank that until after the trial of the cause, they did not know that the deponent Russell knew at *what time* the bill was left at the bank; nor that he knew any fact or circumstance which was in any way important to the defendants in their defence, and that they verily believed the other officers of the bank were equally uninformed until after the trial. The Superior Court upon these affidavits of newly discovered evidence, granted a new trial. To vacate that rule the plaintiff applied for this mandamus.

The points made on the argument were: 1. Whether the defendants had used due diligence in ascertaining whether *Russell* was a material witness, and if so, in obtaining his testimony? 2. Whether as the evidence was merely *cumulative*, as to facts and circumstances relating to the same matters controverted on the trial, and therefore tending to impeach the evidence of the plaintiff given on the trial, the Superior Court ought to have granted a new trial in the cause? 3. Whether, if that court erred in granting a new trial, as that was a matter resting purely *in the discretion of that court*, it was competent for the Supreme Court to control that discretion, or to direct the exercise of it in the inferior tribunal.

Sutherland, J., delivered the opinion of the Supreme Court. The court held that the plaintiffs were guilty of great negligence in not procuring the "newly discovered evidence, and also that it was merely cumulative evidence in the strictest sense of the term; and that upon either ground, if it had

been an application in that court, the motion for a new trial would have been refused," p. 122.

Mr. Justice Sutherland then proceeds :

"But it is contended, that admitting the court below to have erred, in *granting a new trial*, still it is a matter of discretion, not depending upon any fixed and established rules of law ; and it is not competent for this court to interfere with or control inferior jurisdictions in this department of their functions."

This principle the learned judge recognizes ; and he admits that "*a mandamus is proper only where some legal right has been refused or violated, and there is no other appropriate legal remedy.*" (See cases cited, p. 122.) What is meant by the court when they speak of '*the discretion of inferior tribunals*,' and say that they will not interfere with or attempt to coerce it, will be best ascertained by adverting to some of the cases in which that language has been used."

He then examines the case of *The People ex rel. Wilson v. The Supervisors of Albany*, 12 J. R. 414 ; *Giles's Case*, 2 Strange, 881 ; Salk. 45 ; 1 Burr. 556, which were cases where a mandamus had been refused. Also, *Ex parte Bacon & Lyon*, 6 Cowen, 392. *Ex parte Benson*, 7 Cow. 363. *Ex parte Bailey*, 2 Cow. 479. The judge then proceeds :

"These cases sufficiently indicate the nature of the *discretion*, the exercise of which by inferior tribunals or officers this court will not undertake to regulate or coerce. It is that discretion *which is not, and cannot be governed by any fixed principles or rules.* We will not set up our judgment in opposition to the judgment of a board of supervisors, as to what is a reasonable compensation for services performed by a constable for the public, no sum having been fixed by law. But if they refuse to allow *any thing* either on the ground that they have *no discretion* upon the subject, or that the officer has *no right* to compensation, then we will interfere and determine whether they have the power to make an allowance, or whether the officer is entitled to be paid. The powers of the supervisors and the rights of the officer are questions of law. They are legal powers and rights, if they exist at all. *Bright v. Supervisors of Chenango*, 18 J. R. 242 ; 19 J. R. 260. If an inferior court should deny to a party the benefit of an established general rule of practice, not depending at all upon circumstances, I apprehend we should interfere. For instance, if it was a rule of such court that the first de-

fault should in all cases, as a matter of course, be opened upon the payment of the taxable costs, and they should, in a given case, refuse to open such default, we should not only have the right, but should be bound to compel them to do it by mandamus. These observations are equally applicable to motions for new trials founded on newly discovered evidence. It has been shown, that there are certain principles in relation to such applications, which are clearly settled and well defined by long continued practice and an uninterrupted series of decisions in our own and other courts. Those principles are, 1. That a party is bound and presumed to know the general leading points which will be litigated in his case. 2. That if he omit ordinary diligence to procure evidence in relation to those points, upon the first trial, his motion for a new trial for the purpose of introducing such testimony shall be denied. 3. That if it consist merely of additional facts and circumstances going to establish the *same points*, which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative and a new trial shall not be granted."

"In cases to which these principles clearly and unquestionably apply, the granting or refusal of a new trial is not a matter of discretion. The parties have a legal right to a decision conformable to those principles. Where there is a *doubt* upon the point of *negligence*, or as to the *character of the evidence*, or as to its materiality, it becomes a matter of discretion, and the court will not, perhaps I ought to say can not, rightfully interfere."

"But no such doubts exist in this case. It appears to us that the defendants were guilty of gross negligence in not procuring the testimony of Russell upon the former trial, and also that his evidence, as disclosed in the affidavits, is clearly and exclusively cumulative. We think it therefore a proper case for a mandamus."

"The jurisdiction of this court by mandamus, is one of immense importance and extent. It belongs to this court alone. It extends to all inferior courts and tribunals, and officers, executive, ministerial or judicial, within the state. It operates summarily, and in some cases definitively, upon most important interests. In view of these considerations, we have taken this occasion to explain, somewhat at large, some of the leading principles which define the extent and regulate the exercise of this power, so far as they seemed to be applicable to the case before us."

The decision in the foregoing case was received with no little surprise and some disapprobation, by the bar generally, at least

in the city of New York. The justices of the Superior Court, partaking, no doubt, of the surprise, as well as the disapprobation, did not proceed to *vacate their order granting the new trial*; but made their return of all the facts and circumstances of the case; setting forth the affidavits on which the motion for a new trial was made, and also the affidavits read in opposition. The case as presented by the return did not differ from that made by the papers on the motion for an alternative mandamus. The return of the justices of the Superior Court to that writ, concluded by stating "that the rule ordering a new trial was granted upon good and sufficient cause, according to the judgment of the court, and in the exercise of the discretion vested in it; and that therefore they had not vacated it." To this return the relator demurred. After argument,

The opinion of the Supreme Court was delivered by Savage, Ch. J.

"The facts are not varied from what they were when the alternative mandamus was granted. The points presented are the same formerly discussed. I shall accordingly consider as settled principles: 1. That a writ of mandamus lies where a party has a legal right, and no other appropriate remedy. 2. That it does not lie to an inferior tribunal, where such tribunal has the right of exercising its discretion. 3. That the discretion which this court can not control, is one governed by *no fixed legal principles*. 4. That in *all cases* where an inferior court is bound to proceed according to established legal principles, and it is alleged that an *error* has been committed, this court has power to issue a mandamus, and if the error has intervened, the same obligation exists to issue the writ, as to affirm or reverse a judgment upon a return to a writ of error."

Proceeding upon these principles as settled, the Chief Justice comes to the conclusion that the Superior Court had not the *legal discretion* to grant a new trial. He says:

"Upon the whole case, therefore, I am satisfied that the discretion to be exercised by an inferior court in granting new trials for newly discovered testimony, is not an *arbitrary* but a *legal* discretion, and is therefore subject to review by this court; that the defendants in the courts below had been

guilty of laches, in not procuring the testimony of Russell upon the trial; and further that his testimony is merely cumulative; and that for these reasons a peremptory mandamus should be granted."

Judgment accordingly.

Looking at these reasons and at the peculiar vagueness of the question of the laches of the defendants in regard to procuring the attendance of their witness at the trial, it is not easy to imagine an application for a new trial, which would more clearly belong to the class in which the learned Chief Justice admits that a mandamus does not lie to an inferior tribunal. "3. That the *discretion* which this court can not control, is one governed by no *fixed legal principles*." What can be less governed by fixed legal principles than the question of laches? What in fact, after all, is more properly a question for the *discretion* of the court trying a cause, than the expediency of admitting cumulative evidence? The question here was not essentially different. Very extraordinary circumstances might even justify the granting a new trial, upon newly discovered cumulative evidence alone. Whether this was such a case, we do not mean to discuss; but suppose that the court had been dissatisfied with the verdict as against the weight of the evidence given to the jury, and without any *newly discovered cumulative* evidence, had ordered a new trial,—has the Supreme Court jurisdiction to vacate the order by mandamus? It had never claimed it. The court below had a power and a *discretion* as ample as the Supreme Court itself, in granting new trials. It is very true, that to grant a new trial where the facts have been fully passed upon by the jury upon all the evidence submitted to them; to subject the party who has gained a verdict to a new ordeal, and to the risk of having to encounter manufactured testimony on a new trial, would be a great abuse; a monstrous perversion of justice; and in a case of great hardship, the temptation to redress the injury by the summary and beneficial process of a mandamus, would be almost irresistible to a Supreme Court, loving justice, and abhorring the law's delay. But, on the other hand, is this possible abuse of the discretion of the subordinate tri-

bunals half so formidable, as those which would inevitably follow in the train of an indiscriminate review of all such applications to the courts below for new trials? If the Supreme Court have the power by mandamus, to vacate the granting of new trials, they ought *a fortiori*, to exercise the same power of issuing it to compel the courts below to grant them where it is refused, either on grounds of law or fact. In other words, every case where a new trial was granted or refused, would become a case for review by mandamus. This would be most assuredly something more than "a gradual departure from the old law on this subject," as it is styled by Mr. Justice Bronson. It would be to supersede the whole power and discretion of those inferior courts in granting new trials. It would be constituting the Supreme Court a *standing jury*, to review all issues of fact as well as of law, presented to those tribunals. We have no idea that the able and learned judges of that court ever contemplated bringing about such a result; or intended to enlarge their jurisdiction by mandamus beyond what they conceived to be its legitimate boundaries. But we shall see that they were soon called upon; pressed upon all sides to "follow out the principle" of this case, of the *Judges of the New York Superior Court*, and to apply the writ of mandamus to cases to which no lawyer was ever bold enough before, to attempt its extension. Some of these applications, it is true, were refused; but others were successful.

In the case of *Ex parte Livingston v. The Judges of the New York Superior Court*, 10 Wend. 545, an attempt was made by mandamus, by a defendant to have satisfaction entered of a judgment, on the ground that the plaintiff, suing on a *replevin bond*, had not *assigned breaches in his declaration!*" The plaintiff obtained a verdict and had *nominal damages assessed*, on which he entered up judgment for the *debt*, 6 cents damages and the costs of increase. The defendant paid the *nominal damages* and costs of increase but no part of the debt, and applied to the court below for an order that satisfaction be entered; which being refused, a mandamus was asked for from the Supreme Court. The court, Nelson, J., denied the motion with costs. He says:

"We will not determine the effect of the judgment, upon motion, but leave the relator to his writ of error."

In the case of *The People ex rel. Fleming v. Niagara C. P.*, 12 Wend. 246, where that court had set aside a report of referees on the merits, on the ground that they had excluded proper evidence, the court, Sutherland, J., held that the referees were right, and the Common Pleas had erred in setting aside their report; and he granted a peremptory mandamus directing that court to vacate their order, setting aside the report of referees. No question was raised as to the jurisdiction by mandamus.

In the case of the *People ex rel. Manning v. New York C. P.*, a motion was made for an alternative mandamus to compel the Common Pleas to set off the judgment in that court against one obtained by the adverse party in the Supreme Court. The court granted the alternative mandamus. The question of jurisdiction was not raised.

In the case of *The People ex rel. Fisher v. The N. Y. Common Pleas*, 18 Wend. 534, a motion was made for a peremptory mandamus on the coming in of the return to the alternative writ. That required the Common Pleas to vacate so much of an order as gave the plaintiff below leave to *amend his declaration*; or so much thereof as refused the defendant leave to plead it as amended, or show cause, &c.

By the court, Bronson, J. :

"In the case before the court, if the cause of action had in fact accrued before the declaration was filed, the plaintiff should have amended instead of joining in demurrer. If he did not discover his error until the argument, the court should have given judgment against him, but permitted him to amend on the usual terms."

"But the alternative writ was not awarded for the purpose of reviewing the judgment of the C. P. on the demurrer. The mode of coming at that question, is by a writ of error. Neither was the writ ordered on the ground that the court below improperly refused the defendants leave to withdraw the demurrer and plead. But the court went further and allowed the plaintiff leave to amend, and refused the defendants leave to plead to the amended declaration. To say nothing of the unusual course of permitting the *plaintiff to amend* where the judgment on demurrer was in his favor, I can perceive no possi-

ble ground upon which the defendants could justly be denied the right of *answering the amended declaration*. If the demurrer was frivolous, all the plaintiff had a right to ask, was that it should be overruled, and that the defendants should not be allowed to withdraw it and plead. Beyond this, the defendants had rights. They could bring error, and review the judgment of the C. P. Of this right, and of every means of defence, they have been entirely deprived by the order allowing the plaintiff to amend, without permitting them to answer."

The motion for the peremptory mandamus, was granted *with costs*.) See 10 Wend. 598.) The court saying :

"That the judges may always protect themselves against costs by obeying the alternative mandamus. Where they omit to do so, and make a return, it may be presumed that they are indemnified against costs by the party in interest.

To this decision, and the principle to be deduced from it, although Mr. Justice Bronson has rather described it by negatives than defined it positively, it is believed that no just objection can be maintained. The case seems to belong to that class in which the inferior court has deprived the party seeking the mandamus, of the *common right of being heard*. It is as much an infringement of that right, as the refusal of a Court of Common Pleas to *receive an appeal* from a justice of the peace, in a case where the statute has given the right to the party appealing ; and although in one such case, where the Common Pleas refused to receive the appeal, (*The People, ex rel. Doughty v. Dutchess C. P.*, 20 Wend. 658,) Mr. Justice Bronson, subsequent to the decision of the Court of Errors in this case of *The People v. The Oneida Judges*, did decline to interfere by mandamus, though he held the appeal wrongfully dismissed ; yet we have the fullest confidence to show by unquestioned authorities, in England and in our own state, that, in such a case, it was the right and duty of the court to have issued the writ of mandamus. But we postpone the examination of that point until we come to consider the case itself, of the *Judges of the Dutchess C. P.* in its order.

The next case that occurs of a mandamus to a Court of Common Pleas, is the very questionable one of *The People, ex rel. Roe v. The Suffolk C. P.*, 18 Wend. 550. This was a motion for a peremptory mandamus to the Common Pleas, commanding them "to *quash* a certiorari to a justice, and to set aside all subsequent proceedings thereon;" the C. P. having denied the motion to that effect. The ground of the motion was, that the justice after a trial before him and a verdict for the plaintiff, had at the request of the counsel for the defendant, and in *his absence*, prepared the affidavit and other papers necessary for suing out the *certiorari*. The report of the case in the statement of facts is as follows:

"The affidavit on which the certiorari was allowed states the process for the commencement of the suit, the issue joined, the proceedings, verdict, and judgment. It does not state that any question arose about the admission or rejection of evidence, the regularity of the proceedings, or the legal rights of the parties; and it concludes without alleging any ground of error, either in the proceedings, verdict, or judgment."*

At the special term at Albany in April 1836, the motion was denied by

Bronson, J., who held "1. that the conduct of the justice was improper in drawing the affidavit; 2. that if the party intended to rely, as he probably did, on the ground that the evidence did not warrant the verdict, it should have been stated in the affidavit; that therefore the C. P. should have quashed the certiorari," and accordingly a peremptory mandamus was awarded.

We have called this a "very questionable case;" and so we respectfully insist, it is well entitled to be called: first, upon principle, with regard to the writ of mandamus being the appropriate remedy, and secondly, as to the sufficiency of the affidavit. Whether the improper conduct of the justice in regard to the affidavit was not sufficient to warrant

* It is somewhat singular that Mr. Justice Bronson, entertaining the views he did, did not administer a sharp reproof in this case, to the judge or commissioner who allowed the *certiorari* upon such an affidavit.

the setting aside his return, when made, we are not prepared to deny. In *Fox v. Johnson*, 3 Cow. 20, the court, it is true, did set aside the *return* of a justice because it was prepared by the attorney for the plaintiff in error; it may be as Mr. Justice Bronson says—citing the case,—“no less objectionable to allow the justice to prepare papers which should be prepared by the attorney;” but it is not so clear that such a defect should be a sufficient cause for quashing the certiorari, if the affidavit were otherwise sufficient in substance. The affidavit is more for the purpose of satisfying the judge or commissioner who allows the certiorari, that there is reasonable ground to believe there is error, than for the foundation of any subsequent *judicial action*. It is the justice's duty when the writ is granted upon ever so defective or erroneous a statement of his proceedings, to make his return to the writ. It is a mere ministerial duty: and it seems really going great lengths to say that a justice is *ex officio* to be supposed incapable of drawing a true *preliminary* affidavit of the proceedings before him for a party to verify. That he may thereby incur “*suspicion* of his fairness and integrity,” by the party who wishes to prevent a certiorari being brought, seems to Mr. Justice Bronson ample reason for quashing the writ without looking into the return! We can only oppose to so novel and unsupported a proposition—a triple “*negatur! negatur!! negatur!!!*”

As to the other ground for quashing this certiorari; that the affidavit did not sufficiently set forth “the grounds upon which the allegation of error was founded,” Mr. Justice Bronson seems to us to have arrived at a conclusion not only opposite to that which the court adopted in the case of *The People, ex rel. Mapes v. Columbia C. P.*, 6 Wend. 544, but directly opposite to his own admissions in this very case. In the case in 6 Wendell, (and it is cited by Mr. Justice Bronson in this case,) the court, Savage, Ch. J., held *in totidem verbis*, “that a statement of the points relied on for error, besides setting forth the testimony and proceedings before the justice, is not necessary, when the alleged errors consist in the proceedings set forth.” In that case, the C. P. had quashed the certiorari, because the affidavit setting

forth the testimony and proceedings, did not also "set forth the grounds upon which the allegation of error was founded." And Ch. J. Savage unhesitatingly awarded a mandamus to the Common Pleas, to vacate their order quashing the certiorari. Now it appears that the affidavit in this case of the Suffolk Common Pleas, set forth the "*proceedings, verdict, and judgment*." And Mr. Justice Bronson himself admits that he found enough in it to infer that "the party *probably* intended to rely on the argument, that the evidence did not warrant the verdict." Now, if so good a ground of error appeared, *probably* only, this decision of Mr. Justice Bronson granting the mandamus, seems to be not only one of those "gradual departures from the old law on this subject"—but equally a departure from some new and very good law on the subject also.

For, though we see no ground of objection to the remedy by mandamus in the case of the *Columbia C. P.*, where they had *quashed* a certiorari for the defects objected to the affidavit; it by no means follows that either, by the old or the new law, a mandamus was equally an appropriate remedy where the Common Pleas had *refused* to quash a certiorari for that defect—admitting that it really existed. The Columbia Common Pleas had refused to *receive an appeal*; for such the quashing of the certiorari, in effect, was; and the Supreme Court, as we believe, exercised no new, no usurped jurisdiction in looking into their proceedings to see why they denied the party the benefit of his certiorari. But when the Suffolk Common Pleas had *refused to quash* the certiorari, what was the condition of the parties, and of that court itself? Instead of denying either party justice, or the right of being heard, they in effect, decided that they would hear them, and "by God's help," do justice between them. What more could the parties reasonably require? If there was no error in the proceedings before the justice, and the Common Pleas notwithstanding reversed his judgment, the plaintiff had still his remedy by writ of error to the Supreme Court; and he could on that, assign for error any matter which properly furnished good reason why the judgment of the Common Pleas should be reversed, and that of the justice affirmed. He had therefore full and adequate remedy

by writ of error in case of a wrongful decision against him. But when the mandamus went in the case, commanding the Common Pleas to *quash* the certiorari, then unless the defendant brought a writ of error to the Court of Errors, the door of justice was closed to him forever.

The case of *The People, ex rel. Phelps v. Delaware Common Pleas*, is the case of an attempt to compel that court by mandamus, to vacate their order allowing costs; on the ground that the recovery had been reduced, on appeal from a justice's judgment, more than \$10, pursuant to the 2 R. S. 263, § 218. The motion was denied very properly, but without any question raised as to the jurisdiction by mandamus.

The case of *The People, ex rel. Fryer v. N. Y. Common Pleas*, was a case substantially of the same character, and with like result—on the ground that the Common Pleas were right; not that the court had not jurisdiction.

But it is getting high time to look after these "gradual departures from the old law" of remedy by mandamus. The only other case that seems worthy of notice before the question came under review in the Court of Errors, in the *Oneida Common Pleas v. The People*, was the case of *The People v. The Superior Court of the City of N. Y.*, decided in October, 1837.

THE PEOPLE *ex rel.* ROBINSON *v.* SUPERIOR COURT OF
THE CITY OF NEW YORK.

THIS was a motion for a *mandamus* to the Superior Court commanding them to vacate a rule setting a report of referees; or to render judgment, so that the relator might bring a writ of error.

The Supreme Court, Cowen J. delivering their opinion held, that, as it was to be inferred from the course of proceedings as the part of the judges of the Superior Court, that they were dissatisfied with the report in point of *fact*, and not in point of *law*, this court will not grant a mandamus to vacate the order for a rehearing before referees. Mr. Justice Cowen, however, plainly enough intimates, that if the report was set aside because it was conceived that upon

the facts found by the referees, the law was against the plaintiff in whose favor the report was made, and if, after the expression of such an opinion, that court refused upon the application of the plaintiff to render judgment against him, so that he might bring error, this court would award a mandamus requiring the prayer of the plaintiff to be granted."

To this there could be no objection. No complaint, at least, no open one, and no suspicion as yet, manifested by the justices of the Supreme Court that they were misusing the people's most gracious and high prerogative writ of mandamus!

At length, in December, 1839, this question of the jurisdiction of the Supreme Court, to review by mandamus, the decisions of the inferior tribunals, in cases where those courts in the exercise of their judicial discretion, had passed upon matters presented for their judgment, came before the court of Errors for their adjudication. This was upon a writ of error brought in the name of the Judges of the Oneida Common Pleas, by a plaintiff in their court in a case in which the Supreme Court had granted a peremptory mandamus, directing the Common Pleas to *vacate an order for costs* to these plaintiffs. The order had been granted by the Common Pleas, on the ground that the *title to land had come in question upon the trial of the cause*. The case is entitled as follows:

THE JUDGES OF THE ONEIDA COMMON PLEAS v. THE
PEOPLE *ex rel.* SAVAGE. 18 Wend. 79.

The original action in the Common Pleas, in this case was *trover*, for the conversion of 14 *saw logs*, brought by *Esther Sanford v. Savage*, the relator. The title of the plaintiff to the premises was not controverted on the trial: but she *proved* that the land on which they were cut, had been assigned to her by her children by *parol*, as her *dower*. A verdict was found in her favor for \$4 50, damages, and six cents costs. The Common Pleas, on her application, made an order granting her costs on the ground, as above stated "that the title to land had come in question upon the trial of the cause." The defendant obtained an *al-*

alternative mandamus to vacate this order for costs; and on the return setting forth these facts, a demurrer and joinder, the Supreme Court, Nelson Ch. J., awarded a peremptory mandamus. In his brief opinion (see 18 Wend. p. 80, 81,) he says :

“The title to land did not come in question. This proof as to the *title*, in the first instance, being altogether immaterial and to become material only, by way of answer to the defence, could not be volunteered with a view to costs. It was not in the power of the defendant to compel the plaintiff to prove her title to the land in the first instance, as in the case of *Hubbell v. Rochester*, 7 Cow. 115. Her right to the logs was shown independently of it.

“Again : the *possession* of the plaintiff, from 1826 down to the suit in 1835, was enough without showing her title to the premises.”

Peremptory mandamus granted accordingly.

Upon this decision, a writ of error was sued out as before mentioned in the name of the Judges of the Oneida Common Pleas, and on the argument the question was raised whether the Supreme Court had jurisdiction by mandamus to compel the Common Pleas to vacate their order.

After advisement, opinions were delivered by Chancellor Walworth and Senator A. H. Tracy.

The Chancellor, in his opinion, goes fully into the question “whether the Supreme Court was right in supposing that it appeared from the return to the alternative writ, that the title to land did not come in question upon the trial of the cause before the Common Pleas.”

“That the plaintiff gave her title in evidence he says is beyond all dispute. Whether it was possible for her to show the logs to be her's in any other way—is a question which I am not prepared to answer, from the facts stated in this return. If she could not, then it is certain her title to the land was in question according to my decision in the case of *Hubbell v. Rochester*, which was afterwards confirmed by the Supreme Court. p. 84, 85.

At page 81, he says, “It will be seen from this statement of the case, that the question whether the title was material to be shown on the trial in the Common Pleas, was a question of fact, rather than a question of law arising from un-

disputed facts. It appears to me, therefore, that there was no question of law involved in the decision of the Common Pleas: and that whatever authority the Supreme Court may have to correct errors of this kind in mere matters of law, it was the intention of the legislature to make the court before which the cause was tried, the sole judges whether the title to lands came in question, if the decision depended on disputed facts.

"From my conclusion on this point, it is not necessary to the decision of this case that I should examine the question of jurisdiction raised here; and I should prefer to delay a decision thereon, until it could be more fully argued, on one side at least, than was done in the present cause. I must be permitted to say, however, that the mode of proceeding by mandamus, under the present statutory provisions upon the subject, is a very inappropriate remedy to correct mere errors of judgment, either as to law or fact, in courts of general common law jurisdiction."

"It is true the legislature have amended the statute which made it absolutely necessary for the Supreme Court to give judgment for costs against parties to whom a peremptory mandamus was directed, and has left such costs in the discretion of the court. But the defendants in such cases, the judges of the inferior courts, are still liable to the relator for all damages he may sustain by reason of their neglect to comply with the alternative mandamus (?) although they may have returned facts which they supposed were sufficient to justify them in point of law, for not reversing their former decision, and they are also liable to the costs of a writ of error, to this court, if the Supreme Court decides in their favor, and this court happens to differ with the Supreme Court on the question presented by the return. Without intending to express any opinion whatever upon the *general question of jurisdiction*, therefore, I shall vote for a reversal of the judgment of the Supreme Court, because I am not perfectly satisfied that the title to land did not necessarily come in question upon the trial in the Common Pleas, and at all events that it was a question of fact in this case, upon which their decision, when acting judicially under the positive direction of a statute should have been considered as conclusive."

Though the Chancellor thus desired to adjourn the question of jurisdiction by mandamus, it was not declined by one of the law members of the court. It was taken up by Senator Tracy, who delivered a long opinion upon it. He seems

not to have been troubled with any doubts or misgivings as to his state of preparation to decide it. He did not, like the Chancellor, prefer to delay a decision upon the question of jurisdiction until it could be more fully argued. He says:

"My mind was principally interested on the argument of this case by the question whether the decision of the court of Common Pleas that the title to lands came in question on the trial of the cause, is not such a judicial decision by a court of competent jurisdiction for the purpose, that the Supreme Court could not, in the exercise of its legitimate functions, review it by a writ of mandamus. As the conclusion to which I have arrived on this point, makes it unnecessary to decide or discuss the other points of the case, I shall confine my present remarks wholly to it."

He then proceeds, after some general remarks upon "the decisions made in the early history of the Supreme Court," with which to our great relief he informs us, that he "fully concurs," to enter into an examination of the nature and objects of the writ of mandamus. We cannot think that we deprive the learned professional reader of any very useful or curious learning, if we decline to follow the honorable senator through his somewhat eccentric route of research. In his, what was evidently intended to be, elaborate examination of the case of *The People ex rel. Oelricks v. The N. Y. Superior Court*, the display is much more like senatorial debate than judicial reasoning. Not that we differ in fact, at all from his conclusion as to the unfitness of the remedy by mandamus, in that particular case. But, so far as his attack upon the first proposition laid down in that case by Ch. J. Savage, is concerned, viz: "that a writ of mandamus lies where a party has a legal right and no other appropriate remedy," he seems to us feeble in his logic when he is intelligible, and when he is metaphysical, immeasurably incomprehensible. He wishes to represent the learned Ch. J. as maintaining by this proposition that "in every case where the party has no other remedy, a mandamus will lie." And certainly, if the Ch. Justice had laid down any such doctrine, the senator's refutation would have been triumphant and complete. But Ch. J. Savage has advanced no such

proposition. And though Senator Tracy seems greatly puzzled and perplexed to define "what is a *legal right*?" p. 98, we find no help—no light whatever in his opinion upon the question. Is it really so difficult so abstruse and indefinable a quiddity? We had supposed a legal right meant a right which the law so recognizes as a *perfect right* that, if violated, the party may have redress for the violation by some appropriate writ, or other proceeding either now in use, or if necessary, to be devised by the proper court; as the "*officina justitiæ*."

But it is very evident to us that Mr. Senator Tracy had not any fixed or certain notion of the limits of this jurisdiction, at the outset of his opinion; and he does not seem to acquire any more precise one, as he advances. We cannot say of it, in this respect, "*crescit eundo*." He very properly says (p. 92) "The broad distinction between a direction to an inferior tribunal to *act*, and direction to it *how to act*, seems to have at all times been well observed." (In the Court of King's Bench.) But then, as an instance of that court's declining to direct the inferior court how to decide, he cites that ill used, misunderstood case of *The King v. The Justices of Derbyshire*, 4 T. R. 448, as in point, to show that the King's Bench refused a mandamus to compel the Sessions to *receive an appeal* from an assessment of Commissioners of enclosure. (The senator states it as an appeal in regard to *poor rates*, but that is not material.) Now, both in the case in 4 T. R. 488, just cited, and in the case of *The King v. The Justices of the North Riding of Yorkshire*, 3 T. R. 150, cited in it, the King's Bench did refuse the writ of mandamus, and on the same ground in both, viz: that the appellants moved the court for leave to "lodge the appeal and *respite the hearing* thereof to the then next quarter sessions." The Sessions ordered that the motion for lodging the appeal *and respiting the hearing* thereof to the next quarter sessions, be rejected. And on the rule to show cause against a mandamus to "direct them to receive hear, and determine the appeal;" what say the court? Why, simply this: "The court were of opinion that the justices had not acted wrong: for the motion was in effect to *adjourn the appeal*, and it was evidently the intention of the parties

not to enter the appeal unless the court would adjourn it: The justices are to judge of the *reasonableness of the time*; and in some counties they establish a rule regulating the time of notice. Here, they add, there was sufficient time for the appellants to give notice and to come prepared to try it; and the justices, *who are to judge* of this thought so," p. 151; and the rule was discharged.

Now, so far from having refused a mandamus in either of these cases to the sessions to *receive* an appeal, the court expressly put their refusal upon the ground that the motion was to receive and *adjourn*; of which latter they say "this, the justices are to judge of." But these cases are both authorities to prove, if any were needed, that the King's Bench would have granted the writ at once, if the motions to *receive only*, had been denied by the Sessions. See to the same effect the case of the *King v. The Justices of Herefordshire*, 3 T. R. 504.

Equally unfortunate is the learned senator in his statement of the point decided in the case of *Rex v. The Justices of Devon*. He thus states it:

"More recently, in *Rex v. Justices of Devon*, 1 Chitty's Rep. 34, the court refused to compel a quarter sessions to *enter continuances*, saying our powers are great, but they are not unlimited; they are bounded by some lines of demarcation; we are not aware that we have power to interfere with the court below in the way suggested."

Now instead of the court refusing to compel the sessions to *enter continuances*, the court say not one word about the matter. It is the every day practice of that court to order the Sessions "*to enter continuances*, and to hear and determine appeals" which they have quashed without hearing on *the merits*. The application in this case of *Rex v. The Justices of Devon*, was for a mandamus to enter continuances on an appeal, and *also to alter the judgment* of the Quarter Sessions as recorded, by making a *special entry upon the record* of the reasons of their judgment.

Not one word is said in the very few which Abbott, Ch. J.

used in giving the judgment, of any doubt about their power to order the justices to *enter continuances*, if the other branch of the application could be granted. The continuances are a more formal entry. But on the other part of the application, to enter their reasons on the record, Abbott, Ch. J., said: "No instance has been cited in which this court by mandamus ever ordered a court of inferior jurisdiction to give their *reasons* for their particular judgment. All that we have been in the habit of doing is to order them to hear and decide cases which they have refused to hear. I disclaim any power to compel the Sessions to give the reasons for their judgments."

In the case of *Ex parte Morgan*, 2 Chitty, 250, he states the point correctly enough; the court there said: "we cannot in this manner review the proceedings of the judge of an inferior court, or try upon affidavit, any alleged irregularities in his judgment. If there is an erroneous judgment given, a writ of error will lie to rectify it, if error lies; but we cannot tell the judge what he is to do. Every inferior court is the proper judge of its own practice."

This seems to have been the sole principle on which the Supreme Court of Pennsylvania, in the case of the *Commonwealth v. Judges of Common Pleas of Philadelphia County*, 3 Binney, 273, proceeded.

But we do very much doubt if there is any thing in that case to warrant Mr. Senator Tracy's statement of the reason he puts into the mouth of the court as the *sole* ground of their decision, when he says—"it decided that a mandamus would not lie to re-instate an appeal which they had dismissed, *because* a mandamus cannot go to an inferior court compelling them to make a particular decision, but merely to decide." Ch. J. Tilghman does, it is true, state that general principle, and cites the case of *United States v. Lawrence*, 3 Dallas, 42. And he does say, 'upon this principle it would be improper to issue it; the Common Pleas have already decided according to the dictates of their best judgment.' But he adds in the next sentence. "But there is another reason decisive against the motion. It is conceded by the counsel who made it, that if a writ of error lies in this

case, a mandamus ought not to issue. It appears to me that a writ of error does lie." Yeates J. concurred in this view, expressly declining any opinion on the other point. This case, as to the question whether if even a writ of error would lie in such a case, a mandamus might not still be an appropriate remedy, will be the subject of a brief inquiry hereafter. At present, as we have, it is believed presented a full view of the case of the *Oneida Judges*, and of the grounds on which Mr. Senator Tracy, puts the question of jurisdiction by mandamus over the proceedings of inferior tribunals we shall merely give the resolution adopted by the Court of Errors on reversing this case of the *Oneida Common Pleas*, and then very briefly review the cases of this jurisdiction, since decided by the Supreme Court.

The resolution adopted by the Court of Errors was as follows. 18 Wend. 106.

"On the question being put, *shall this judgment be reversed*," all the members of the court (22 being present) voted in the affirmative.

"Whereupon the following *resolution* was unanimously adopted :

"Resolved, that in this case the Supreme Court had no jurisdiction by *mandamus* to review the decision of the court below, certifying that the title to land came in question on the trial."

It certainly cannot be imputed to the judges of the Supreme Court that they did not bow with sufficient reverence to this decision of the court of dernier resort. On the contrary, it would seem they hastened to recede as much too far within the proper limits of their jurisdiction, after this decision, as they had before incautiously wandered beyond them.

This observation however, cannot apply to the first reported case which came before the whole court : *The People ex rel. Orlando Fuller and Mary Fuller v. The Judges of the Oneida Common Pleas*, 21 Wend. 20, which was decided at the January Term, 1839. Mr. Justice Bronson, who delivered an opinion, goes somewhat into the case to show that the Common Pleas erred in their decision. The

case was presented upon the return to an alternative mandamus to the Common Pleas commanding them to *vacate their order setting aside a report of referees*, which return was demurred to. Upon the return it appeared that the relators husband and wife, were sued as *joint contractors*, before a justice of the peace for a debt due from the wife *dum sola*; that they were not described in the process or declaration as husband and wife, nor did they or the bill of particulars before the justice contain any allegation of their coverture. The proof however, having established their liability as husband and wife, and judgment having been rendered against them by the justice, they appealed to the Common Pleas, where the cause was referred. The referees on the hearing, excluded evidence of the indebtedness of the wife to the plaintiff prior to her marriage with the other defendant, and also rejected the proof offered of a subsequent promise by the husband to pay the account, and reported nothing due from the defendants. The Common Pleas on the plaintiffs motion, set aside the report.

The court, Bronson J. delivering their opinion, held that the Common Pleas had erred in setting aside the report: that as the declaration before the justice was in the usual form against joint contractors without any allegation that the relation of husband and wife existed between them, the proof should be confined to such a joint demand.

But he says—"The relators have another remedy, and that is a ground for denying a mandamus. On a *rehearing* if the referees follow the decision of the Common Pleas, and decide against the relators, the question can be put upon the record and reviewed by writ of error. Since the decision of the court for the correction of errors in *The Judges of the Oneida Common Pleas v. The People*, 18 Wend. 79, I think the case of *The People v. The Niagara Common Pleas*, 12 Wend. 246, ought not to be followed. I do not adopt *all the reasoning* of Senator Tracy in the case recent-

ly decided, but rest my opinion on the single ground that the relators have another remedy.*

"The Chief Justice concurred in the above views."

And so we also beg leave to concur ; but not by any means with the conclusions of Cowen, J. who not only concurred that the Common Pleas erred and that mandamus was not the appropriate remedy, but he takes occasion to maintain that "supposing there was no remedy by writ of error, and supposing *The People ex rel. Fleming v. The Common Pleas of Niagara*, to have been a solemn decision upon the point under discussion, still I must be permitted to question our power to interfere, since the decision of the Court of Errors in the *Judges of the Oneida Common Pleas*.

"The *resolution* in that case, (says Mr. Justice Cowen in a strain of eulogy for which we were not prepared from so determined a hunter of cases,) "was after a very elaborate and able view of our power by Mr. Senator Tracy, who has cited most of the English and American cases." We have already seen *how* he has *cited* them ; and it has cost us, as it will no doubt the learned reader, no small share of a good stock of patience to expose those *citations* as wholly inaccurate in almost every instance ; some of them pressed into the support of a *general proposition*, which they do on their very face refute. Cases thus carelessly and loosely *cited* by judges of high courts in this way, when reported become for years, false beacons, misleading the bench and the bar, till finally when investigated, they are discovered to have been totally wrested from their original purport, and then

* Note by the reporter. "This case was decided in January Term, 1839, since which time the question of the proper office of a *mandamus* has been more fully considered by the court, and the views of Senator Tracy, (as expressed in the case of the *Oneida Common Pleas*, 18 Wend. 79,) recognized as the *true rule* on the subject, as will be seen in an opinion delivered by Mr. Justice Bronson, in the *People ex rel. Doughty v. The Dutchess Common Pleas*, 20 Wend. 658, which although *published* previously to the decision of this case, was in fact pronounced subsequently." p. 22, 23.

See case of *The People v. Dutchess Common Pleas*, referred to in the above note, *post*. 351.

comes one of those *boulversements* that are made a reproach to our whole system of jurisprudence. It is for this reason, as we believe, that those great judges whom we are most accustomed to reverence are generally as sparing as possible in sprinkling their decisions with cases; and never those of doubtful authority and application. Mr Justice Cowen, adopting, however, without the least reserve, all the *cases cited* by Senator Tracy as accurately stated, comes to the following conclusion as the result of that senator's profound research upon the question of jurisdiction.

"For one, if I have not entirely mistaken the scope of the decision in the *Judges of the Oneida Common Pleas v. The People*, I shall not feel myself warranted in consenting to a mandamus for the purpose of *disturbing any judicial decision whatever*, of an inferior court or magistrate." p. 25.

This is the broad, indiscriminate renunciation of all control by mandamus over all the judicial action of inferior courts and magistrates which we are combating; although as to this particular case of *The People ex rel. Fullers*, there can be no doubt, without reference to the resolution of the Court of Errors, in the case of *The Oneida Judges v. The People*, that the mandamus was very properly refused. The case of *The Niagara C. P.* was simply following out the principle of the previous case of the New York Superior Court, in 5 Wend.

The case of the *People ex rel. Werckmeister v. The Judges of the New York Superior Court*, 20 Wend. 663, decided at the special term, December, 1839, was a case, where Mr. Justice Bronson refused a mandamus to require the Superior Court to correct a case settled by them upon a special report of referees, to be inserted as a state of facts in the record, with a view to the questions of law which the relator desired to review on error. The same observations precisely apply to it as to the case of *The People ex rel. Fullers v. The Oneida Judges*.

We next come to the case in which Mr. Justice Bronson is said by the reporter as we have seen, to have "more fully considered the question of the proper office of a writ of mandamus, and to have recognized the views of Senator Tracy." And in reviewing that case, if we shall go into a more ex-

tended notice of the authorities, and more in detail than may at first appear necessary, we hope the learned reader will pardon us for the particularity, as we have just seen how dangerous is the practice of citing cases by wholesale statement. The general proposition we intend to establish is, that the Supreme Court has and of right ought to have, and has not by the *resolution* in the *Oneida C. P. v. The People*, been deprived of, the power of controlling a certain class of judicial decisions or proceedings, which it has since that resolution, disclaimed. In other words, while we maintain that Mr. Justice Bronson, ought not to have interfered by mandamus in the case of the Suffolk C. P. (ante, p. 334,) we hope to show that he might and ought, on the other hand, to have granted the writ, in the case to which we now address ourselves.

THE PEOPLE *ex rel.* DOUGHTY *v.* THE JUDGES OF DUTCHESS C. P., decided and reported in the Supreme Court. 20 Wend. 658. December, special term, 1839, Albany.

By the return to the alternative writ of mandamus in this case, it appeared that one Griffin, had recovered a judgment against Doughty, the relator, before a justice of the peace, on the *twelfth* day of March, 1839, from which D. appealed to the C. P. When the cause came on for trial in the C. P., Griffin objected that the court had no jurisdiction, the *affidavit and appeal bond* reciting the judgment as rendered on the 11th of March, whereas the return of the justice was of a judgment rendered on the 12th day of that month. In all other respects, the affidavit and bond were in due form. The relator thereupon offered to prove that only one cause had been tried before the justice between the parties, and offered to amend the bond. But the court refused the amendment, "for the reason that the bond was neither informal nor imperfect, but was a bond to remove a different judgment from the one returned by the justice, and also for the reason that the affidavit upon which the appeal was allowed, also mentioned a judgment different from that returned by the justice, and which affidavit the C. P. could not amend." Whereupon the court refused to proceed to the trial of the

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cause; and although no notice of a motion for that purpose had been given, *quashed the appeal*. The alternative mandamus required the judges of the C. P. to vacate the rule quashing the appeal, and to deny the motion to quash the appeal, or show cause, &c.

"By the court, Bronson, J., "Although the bond was perfect in point of form, there was a variance of a day in reciting the judgment. The recital of the day on which the judgment was rendered, was wholly unnecessary; 2 R. S. 259, § 189, and the variance was such an imperfection, as the court might have, in its discretion, allowed to be amended. § 204. There is also another statute fully warranting the amendment; 2 R. S. 556, § 33, 34, and the court of C. P. *erred in ordering the appeal to be quashed.*"

"This presents an important question in relation to the appropriate office of the writ of mandamus. The court of Common Pleas, acting within the scope of its jurisdiction, has heard and decided a matter properly brought before it for adjudication; and the question is, whether we can by mandamus, require that court to undo what it has done, on the ground that the decision was erroneous. I am of opinion that we possess no such power. I shall not stop to enquire whether the order quashing the appeal was such a final judgment upon the rights of the parties as may be reviewed by writ of error, nor whether the relator has any other remedy. 3 Binney, 273."

In the case cited here, the Supreme Court of Pennsylvania held that "a mandamus would not be granted, where the Common Pleas had dismissed an appeal contrary to the statute authorizing it, but that a writ of error would lie." Tilghman, Ch. J., says, and the court concurred;—"The striking off the appeal, is certainly in the nature of a judgment. It is the act of the court dismissing the appeal, and thus making an end of the cause. It is substantially in the nature of a judgment." 3 Binney, 275-6.

Mr. Justice Bronson continues: "I place my opinion on the *broad ground* that the writ of mandamus can not be awarded for the *correction of judicial errors.*" Such errors, if corrected at all, must be reached by some other process than the writ of mandamus."

Mr. Justice Bronson has not thought proper to inform us by what other process, nor worth his while to define by any line of demarcation whatever, the boundaries of this *broad ground*, on which he places his opinion. The expression "*judicial errors*," to which he no doubt attached a limited meaning, is used by him without reservation, qualification or exception. Now, if he meant to say that no act, order or even *judgment* in its strictest sense, of an inferior court or magistrate acting judicially can or ought to be corrected by mandamus, we humbly apprehend this *broad ground*, can not be sustained. But of this we propose to treat somewhat at large hereafter.

Mr. Justice Bronson then records the following *peccavimus*, on behalf of himself and his learned brethren of the Supreme Court :

"It is not to be denied that there had been a gradual departure, in this state, from the old law on this subject, until this court had, in one instance at least, exercised a jurisdiction by mandamus as large as that which we now decline. But we stand corrected by the decision of the court of last resort in the case of *The Judges of Oneida v. The People*, 18 Wend. 79. As we understand that decision, taken in connection with the resolution adopted by the court, we have no jurisdiction *by mandamus*, to review the decision of a subordinate court in a matter of which it had *judicial cognizance*."

"Of this doctrine we do not complain. On the contrary, I will mention by way of confirmation, a few authorities in addition to those cited by Mr. Senator Tracy in his opinion."

He then cites *Chase v. Blackstone Canal Co.*, 10 Pick. 244, which was like that of *The Oneida C. P. Judges*, a case where a mandamus ought not to issue. It was on the contrary, as urged by the counsel for the defendants, "a clear case for a *certiorari*," if any thing. Besides which, the judgment of the County Commissioners in regard to the relator's costs, which formed the point in controversy, was apparently correct. He cites also, the case of *United States v. Lawrence*, 3 Dall. 42, where the Supreme Court of the United States held, that they could not interpose by manda-

mus to compel a district judge to issue a warrant for apprehending a Captain Barre, as a deserter from his own ship, he having, on application to him for such warrant, already adjudged that the evidence was not the kind of proof designated by the treaty which gave him jurisdiction. 3 Dall. 44. And certainly in such a case, no judicial power could, or ever did attempt by *mandamus*, to make a judge who had full jurisdiction, "decide according to the dictates of any other judgment but his own," as the court there very pointedly expressed it.

Mr. Justice Bronson cites, also, from the case of *Strong, Petitioner, &c.*, 20 Pick. R. 484, in aid of Senator Tracy, some general remarks of Morton, J., upon the proper office of a writ of mandamus. We find nothing to criticise in them, and nothing that has the slightest affinity to this question of jurisdiction over the proceedings of inferior courts in particular instances. He expressly says—"It cannot be maintained that the decision of the examiners, (of county votes for county officers,) was an act within their *legal* discretion. Whether their determination, as to the reception or rejection of returns, would be deemed a judicial decision may well be doubted. But nothing can be clearer than that the counting the votes, and ascertaining the majorities, and giving certificates of the result, are mere ministerial acts;" p. 497. Now nothing could have been further from Judge Morton's idea, in his *general remarks* upon the office of a mandamus, than to enquire and define where and when the writ might or might not issue, to control the action of inferior courts or magistrates. The cases of *Ex parte Hoyt*, 13 Pet. 279, and *Ex parte Whitney*, 13 *ibid.* 404, were cases precisely like that of *U. S. v. Lawrence*, in principle, and correctly decided in the same manner.

But the authority on which Mr. Justice Bronson seems mainly to rely, is the case of *The King v. The Justices of Monmouthshire*, 7 Dow. & Ryl. 334, which he says indeed "is much like the case at bar." There, the Court of Sessions had, upon hearing *on the merits*, upon the question of *fact* of the residence of a pauper, quashed an appeal; and a motion for a mandamus to compel them to hear and determine the appeal anew, was denied by the Court of King's Bench

—r. 334. Now how that case can be said to be "much like the case at the bar," where the learned judge himself proves that the Common Pleas had *wrongfully dismissed* an appeal without *hearing it at all*, it passes one poor understanding to give a tolerable guess. The case in Dow. & Ry. certainly was exactly like the case at bar in one respect; to wit: that there was *in both*, an application for a mandamus to an inferior tribunal. But as to the *merits* of the two applications, it is about the same similitude, in reality, as that of the brave Welsh Captain, Fluellen, in Henry V., in comparing his king, Henry V., born in Monmouth, to Alexander the Great, born in Macedon: "There is a river in Macedon; and there is moreover a river at Monmouth; and there is salmons in both."

In this case of *The King v. The Justices of Monmouthshire*, the mandamus was applied for to the Sessions "to cause continuances to be entered, and at their *next sessions* to hear and determine the merits of the said appeal," and the case was this. The appeal had been heard upon the *merits*, and the sessions being *equally divided*, they then directed the appeal to be *quashed*, without any *division*, and without any dissent being expressed"—p. 334, 5. The application was resisted upon the idea that the King's Bench had no authority to compel the sessions, who had decided on the merits, to *review their decision*. So say the counsel who showed cause; and such is the language of Abbott, Ch. J., with which Bailey and Holroyd, Js., concurred. Abbott, Ch. J., says—"I am of opinion that the rule *nisi* for a mandamus must be discharged. In this case the justices at the Quarter Sessions *have actually given judgment upon the appeal*. We are not a Court of Error to *review their decision*." "*In form*, this is an application to enter continuances, and hear and determine the appeal; but it is *in substance*, an application to *expunge the proceedings*, which the justices have already taken." This was the true and conclusive objection to the application. But the language of Ch. J. Abbott gives us full right to claim that if the application had been in *substance* what it was in *form*, viz: to compel the sessions to *receive* an appeal, which they had refused to receive, that it would then have been within the

appropriate sphere of the writ of mandamus. For, in the case of *The King v. The Justices of Somersetshire*, in the same term, 7 Dowl. & Ryl. 385, we find the following record, most pregnant with instruction on this point, to which we respectfully invite Mr. Justice Bronson's special attention, when next this question, in the shape in which it was presented to him "in the case at bar," shall happen to come again before him for judicial determination. The case is thus stated :

THE KING v. THE JUSTICES OF SOMERSETSHIRE, 7
Dowl. & Ryl. 385.

"Pursuant to a peremptory mandamus from this court, the justices at the Somersetshire Epiphany Sessions, *heard the appeal of James Tucker*, against the decision of the Special Petty Sessions for the hundred of Winterstoke, in the county of Somerset, dismissing his application for relief under the 3 Geo. IV. c. 33, § 2; and found that Mr. T. had sustained damage to the amount of £30, &c., by having ricks of corn wilfully consumed by fire, &c., which they (the justices) adjudge to him to be paid by the hundred, &c.

Now, on referring to the application for the mandamus in the case of Mr. Tucker, 5 Dowl. & Ryl. 434, we find that the Court of King's Bench held, that an *appeal* lay from the Special Petty Sessions to the Quarter Sessions, in that case; and that they granted a writ of mandamus to the justices of the county of Somerset, "commanding them to *hear the appeal*." It appeared that when the appeal was presented for hearing at the Sessions, "they refused to entertain it, on the ground that nothing had been *done* by the Petty Sessions, in pursuance of the act, against which an appeal would lie, so as to give the *Quarter Sessions jurisdiction, and therefore the appeal was dismissed*."

Here, if we are any judges of likenesses, was a case, not only "*much like the one at bar*," but on principle, *ad idem*, with respect to this question of a mandamus to the court below, commanding them to hear and determine the appeal. And what was the result in the case in the King's Bench? Why, as follows :

"In Easter Term, Mr. Tucker obtained a rule upon his justices to show cause why a mandamus should not issue commanding them to hear the appeal, upon notice of the rule, to the said justices or some of them. On the last day of Easter Term the rule was made absolute, on an affidavit of service upon these justices alone who had originally heard the complaint at the petty sessions, and upon the high constable of the hundred; and no cause being shown a mandamus was ordered to go, and the writ was served upon the same justices only. When the appeal was afterward presented for hearing at the Quarter Sessions, the justices then assembled refused to hear it, on an objection taken by the respondents' counsel, that the rule nisi, for the mandamus had been improperly served, not having been served upon more of the county justices. Now, on showing cause against the rule for quashing the writ of mandamus on the ground that it had been improvidently issued, two questions were raised: first, whether the Quarter Sessions had jurisdiction to entertain an appeal under the 3 Geo. IV., where the Petty Sessions had done nothing in pursuance of the act; and, secondly, whether the rule *nisi* had been properly served."

No doubt or question was raised, at the bar, as to the appropriateness of the remedy by *mandamus* to compel the Quarter Sessions to receive and hear the appeal if these questions were decided affirmatively. The court so decided, and Abbott, Ch. J., in delivering the opinion of the court says:

"I think we ought not to quash this writ. We are informed by the officers on the crown side that the service of the rule has been according to the constant course in similar cases."

"At the same time, however, if it could be shown that the writ had issued improperly, and commanded the justices at Sessions to do something which by law they had no power to do, it would be the duty of the court to quash it on the ground that it had been improvidently issued." "The question then is, whether if the justices at the Special Petty Sessions decide against the party complaining, *not upon the merits of the case*, but upon some opinion which they have formed of the law, which turn out to be erroneous, such a determination is not an *act* done? I think it is so. The ground of our decision is, that this was a dismissal of the complaint, *in consequence of a mistake of the law*, and not a dismissal upon a hearing of the merits." A peremptory mandamus was ordered to go."

Upon these authorities, without going further into the English cases, we should feel at liberty to rest our claim that this case of *The People ex rel. Doughty v. The Dutchess C. P.* was a proper case for a mandamus to *hear the appeal*; nay more, a very clear case for the exercise of that power. But we beg the reader's indulgence for presenting to his notice a few of the still more recent English decisions on this subject, as contained in the note subjoined.*

* 1. *The King v. The Justices of Cumberland*, 4 Adolphus & Ellis, 695. (1836,) upon a rule to show cause why a mandamus should not issue, requiring them to hear the complaint of the overseers of *Wetheral*, in the said county against John Bowman for refusing to maintain his wife and child, it appeared that the owners had preferred a complaint against Bowman as a vagrant for refusing to maintain his wife and child; and being brought before two justices, he denied being married to the woman and produced some evidence to prove it; and he threatened the magistrates with an action if they committed him. The overseer offered evidence of a *Gretna Green* Marriage, but the justices refused to hear it, and dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place, out of the county, and that the parties ought to try it in the Ecclesiastical Court.

"The Court of Kings Bench held that the justices, having begun to hear the complaint, were bound to *hear all*. It was urged as the argument against the mandamus, that they had virtually *heard the complaint*. (Lord Denman C. J. Then they stopped the party *against whom they decided*.) The court declined to hear the counsel in support of the rule.

Lord Denman C. J. It is quite clear that the justices have done wrong. They exercised their discretion in deciding at first to *hear the case*; then they were not right in refusing to *hear the whole* of the evidence offered. The rule must be made absolute.

2. *THE QUEEN v. THE JUSTICES OF OXFORDSHIRE*, 4 Adolphus & Ellis, N. S. 177. (Queen's Bench Reports.) 1843.

"Three persons were *jointly* summoned for unlawful fishing: they were heard *jointly* and convicted in *separate* penalties for each defendant. They gave a joint notice of appeal, under the act, as against "a conviction of us, &c., naming the three, and entered into separate recognizances.

Three *several* convictions, one of each defendant, being afterwards returned to the sessions, they *without hearing the merits*, affirmed the convictions, on the ground that the *notice of appeal misdescribed the convictions*."

The Court of Kings Bench issued a mandamus commanding the sessions to *hear the appeals*, notwithstanding their judgment of *affirmance*, holding, that if there was any variance, (and semble, there was not,) it was one which

It seems too clear to admit of question, that upon the "broad ground" assumed by Mr. Justice Bronson, in this

could not mislead." (The case of *Regina v. The Justices of Denbighshire*, 9 Dowl. Pr. C. 509, was cited and treated by the court as conclusive.)

3. THE QUEEN v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE
Ad. & Ell. (Queen's Bench) Rep. 1. (1843)

The return of the justices in this case to an alternative mandamus stated, that on notice of an order removing paupers from *Sheffield* to *Crich*, which they received, the overseers of the latter township gave notice to those of *Sheffield*, of an appeal, which they afterwards countermanded, but reserving the right to appeal when the paupers should be *actually removed*. At the following sessions the overseers of *Sheffield* according to the *alleged practice* of the sessions, entered an appeal against the order, as by the overseers of *Crich*, but *without their knowledge and consent*: and thereupon the order of removal was confirmed with costs. More than six months after the confirmation, the pauper was removed to *C.*, whereupon the overseers of *C.* applied at the next sessions, "to erase the entry of the previous appeal and order of confirmation and to enter their appeal against the order of removal." The sessions refused. They submitted that they had no power to erase the entry of appeal and confirmation or to alter their records; and that inasmuch as this order of removal had been confirmed, they had not entered another appeal and continuances, as commanded by the writ.

Lord Denman, C. J. This is a peculiar case. It may *perhaps* be the first time we have been called upon to erase an entry on the records of the sessions; but it is not new in principle. The mandamus to enter continuances is in some respects, a stronger interference of this court. It is necessary for the purposes of justice that we should interfere; for the sessions could not erase the entry without the authority of a mandamus. The entry may possibly altogether defeat justice; for when the question of the validity of the order shall hereafter arise on appeal, the justices may refuse a case. When the erasure now called for has been made, they will discuss the order of removal on its merits. Coleridge J. said. "The statutes give no such appeal to the removing parish. The practice is irregular and unjust, and is converted to a fraudulent purpose. If there were no other instance of a mandamus in such a case, I think there is a jurisdiction inherent in this court to make a precedent." Peremptory mandamus granted accordingly."

4. REGINA v. JUSTICES OF FLINTSHIRE, 2 Dowling & Lowndes's, Queen's Bench
Practice Court Reports, 143. 1844.

The Quarter Session in this case were called on to show cause why a mandamus should not issue, commanding them to enter continuances and heard an appeal against an order of justices for the removal of *H. R.* and her three

case, he would have refused the mandamus in all these later cases as well as those we have already cited : that he would have held them all "*judicial errors*," beyond the reach of a mandamus, since the decision in the case of the *Onsida Judges v. The People*. If this be so, is not the refusal of the mandamus in this case, as wide a "departure from the old law on this subject," as was the previous practice of issuing it to compel inferior courts, where they had already *decided* motions for new trial, &c. *heard on the merits*, to reverse their decisions even without a rehearing? It strikes us very forcibly that the only distinction is, between a sin of commission and one of wilful omission; a point of casuistry, as to the degree of culpability, which the schoolmen have not been able satisfactorily to decide.

children from the parish of Cum to the parish of L. L., in May, 1843. The sessions had already made an order quashing a former order of appeal, in general terms: "that the order be quashed," the respondents offered to show by *evidence*, that it was quashed on a *formal defeat only*: viz., on the ground that the examination of H. R. was defective in stating hearsay evidence. This evidence, however, the sessions refused to admit, because there was no entry on their minutes that the order had been quashed for want of form.

Colerige J. said; I wish very much that this case had not been argued before me whilst sitting alone in this court; for however clear the principle may be which governs our interference in such matters, the dividing line is ever subject to much doubt. It is clear that if the court below has heard the objection and decided it, this court is not a court of appeal to reverse their decision: if, on the other hand, they have refused to hear it, then this court will interfere and command them to do so. The question therefore is, has there been a hearing? As I understand the facts, the respondents having got a fresh order were met with the objection that the former order was conclusive; and that the entry of its being quashed must be taken to mean on *the merits*; and the sessions acting on this objection accordingly refused to hear *evidence* to explain the entry. In this I think they acted wrongfully. It is said that even if the evidence had been received, it could not have altered the decision to which the sessions came. But we must look at the whole circumstances of the case, and it is impossible not to see that the justices exercised no judgment in the matter. It is possible that if they had heard the evidence they might still have come to the same decision; but then they would have decided the case *on a hearing*; and this court would not have disturbed their decision. There is a fallacy in arguing as to the effect of the evidence when it was not heard. The rule must therefore, be absolute for a mandamus, commanding them to enter continuances and hear the appeal."

The few remaining cases upon this subject, reported since this decision of Mr. Justice Bronson are, *with one exception*, cases where the court could not, without "departing from the *old law*," as it is termed, have allowed the writ to issue. With the decision in the case of *Ex parte Fitzgerald*, 23 Wend. 148, which was an awkward attempt to obtain a mandamus commanding the Judges of the N. Y. Superior Court, "to vacate a rule setting aside a verdict, and granting a new trial," certainly no fault can be found; and it was a fit enough object of the Chancellor's pleasantry upon the subject of "*the novus hospes*"—as he termed that application: one which was of course denied.

In the case of *Ex parte Gordon*, 2 Hill, 263, and *Ex parte Brandlacht*, 2 Hill, 367, attempts still more preposterous were made to accomplish by writ of *Prohibition*, what, in such cases, the court would very properly, at all times, have refused to do by mandamus. On the first application, which was a motion for a *prohibition* to the Common Pleas *forbidding all further proceedings* in a case where they had *refused, on hearing, to quash an appeal*; the court, Cowen, J., said: "This application is without precedent, and the motion is denied on the ground that a writ of prohibition will not lie, any more than a mandamus, for the purpose of reviewing a decision of an inferior court, because it is erroneous." The decision was undoubtedly correct; but the distinction so well established by the English authorities, between the case of a mandamus to control an inferior court when it *quashes an appeal without hearing*, and when it has *heard and quashed*, never appears to have entered the mind of Mr. Justice Cowen, after he had read and given in his plenary adhesion to the able and learned opinion of Mr. Senator Tracy, as above recorded.

The cases of *Ex parte Fleming and another*, 4 Hill, 581, of *The People, ex rel. Blacksmith v. P. L. Tracy*, First Judge of Genesee, 1 Denio, 617, of *Ex parte Koon and others*, 1 Denio, 644, and of *Elkins v. Athearn*, 2 Denio, 191, which were all motions for mandamus, in cases where decisions had already been had upon the *merits after hearing*, need no further note or comment.

The only remaining one is the excepted case to which we have adverted as among those subsequent to that of the *Oneida Judges*. That is the case of *Ex parte Ostrander*, 1 Denio, 679, Dec. Special T., 1845.

This was a motion for a mandamus to the Columbia Common Pleas, to compel that court to vacate a rule *dismissing* an appeal from a justice of the peace, and to proceed with the case, the appeal having been *quashed without hearing*.

"The court (Jewett, J.,) held, that the Common Pleas had acted *wrongfully and against the statute* in dismissing the appeal without hearing. He says, "A motion to dismiss an appeal, must be made at the first term of the Common Pleas for which there is time to give notice. The Common Pleas cannot, by *rule* granted at such *first* term, give leave to move to dismiss at a succeeding term. 2 R. S. 261, § 202. It was virtually an attempt to enlarge the time fixed by statute in which to perform a particular act. This is a power which the court did not possess." (5 Wend. 135; 7 Paige, 245; 9 *ibid.* 572.)

"The Common Pleas having decided otherwise, the important question arises whether this court, in the due exercise of its jurisdiction over inferior tribunals can correct the error by mandamus. It is argued that without the aid of this writ, the party is remediless. This is not a sufficient ground in itself to entitle the party to the writ. It is true that when a party has another legal remedy, a mandamus will generally be refused on that ground; but it is not true that because a party has no legal remedy unless by this writ, that it will be granted for that cause. The Common Pleas had *judicial cognizance* of the subject matter; and although I have no doubt that it *erred* in its decision, yet it cannot be corrected by mandamus. It was clearly a *judicial error*." And cites to prove it, 18 Wend. 79 and 20, *Id.* 658, (the cases of *The Oneida Judges*, and of the *Dutchess Common Pleas*.)

From this decision of Mr. Justice Jewett we must take leave to dissent, if possible, still more strongly than from that of Mr. Justice Bronson in the case of *The People, ex rel. Doughty v. The Dutchess Common Pleas*. The easy nonchalance with which the learned judge *assumes* the grounds of his refusal to interfere, viz: that "the Common Pleas had *judicial cognizance* of the subject matter," and that "it was clearly a *judicial error*," indicates sufficiently

that he had embraced the creed of his predecessor, Mr. Justice Cowen, as avowed in the case of *The People, ex rel. Fuller v. The Oneida C. P.*, where he said—"I shall not feel myself warranted in consenting to a mandamus for the purpose of disturbing any *judicial decision whatever of any inferior court or magistrate.*" For what can be clearer, than that if the Common Pleas of Columbia, in *direct violation* of the statute, as Mr. Justice Jewett well proves, extended the time to move to dismiss the appeal to the next term, that it had not judicial cognizance, in any legal sense of the term, of the "subject matter?" The statute expressly forbade them to entertain the "subject matter," and their action in refusing to hear and in dismissing the appeal, was *extra judicial, coram non judice*, and utterly void. In such a case, the King's Bench, as we have seen, unhesitatingly grants a mandamus compelling the inferior court to *hear the appeal*. It was not a *judicial error*; for they had no jurisdiction at the second term to *dismiss*. They were acting in plain violation of the statute; and unless the party had another legal remedy, and when we say remedy, we mean an *effectual* remedy, for otherwise it is none; then it was the clear duty of the court to allow the mandamus. It was their duty to vindicate the statute, which the Common Pleas had in effect, trampled under foot. But it would only be to repeat the observations we have ventured already upon the cases of the *Suffolk Common Pleas*, and the case of the *Dutchess Common Pleas*, to pursue this branch of the subject further. We might fill whole pages with the bare titles of authorities in the Court of King's Bench where in cases like this, writs of mandamus have issued to command the Sessions to hear appeals which they have improperly dismissed. Those we have selected from among scores of the like nature, will surely suffice to establish the proposition.

But perhaps it will be said that the party in this case of *The Columbia C. P.* had *another* remedy. Mr. Justice Jewett expressly admits the contrary, if we have the honor to understand his language. He says: "but it is not true, that *because* a party has *no legal remedy* unless by this writ, that it will be granted for that cause." Nor can we

fully agree to his general proposition, that "where a party has *another remedy* a mandamus will *generally* be refused." It should, indeed, be a very extraordinary case to justify an interference where the law has given the party another *equally effectual remedy*. That is the true rule on this subject. See the case of *Regina v. The Hull & Selby Railway Co.* 5 Queen's Bench Rep. 70. The converse of this principle, as stated by the learned judge, it is not material to determine. For if, as we have all along maintained, it is well settled that the writ of mandamus is the appropriate remedy in cases like this under consideration, then whether the party may or may not bring error upon such a wrongful refusal to hear his appeal, is a question that cannot be legitimately drawn into the discussion. The party here has suffered a grievous wrong; in palpable admitted violation of the statute, he has been denied the *right of being heard*. Then he presents a clear case for the established, summary and effectual redress by mandamus to compel the court below to *hear him*, and he can have that effectual remedy by no other process than this. It is on this very account of the prompt and summary redress of such grievances that the mandamus is called so beneficial a writ; and when a case is presented for its exercise so clear and urgent as by unquestioned principle and precedent this before Mr. Justice Jewett was, then the language of Savage, Ch. J., (10 Wend. p. 291.) applies with full force." The same obligation exists to issue the writ as to affirm or reverse a judgment upon a return to a writ of error." And this constitutes our full answer to the case of *The Commonwealth v. The Phil. Com. Pleas*, 3 Binney, 273, at least all that it deserves. We do not by any means concede with the counsel for the relator in that case that, if a writ of error would lie, the party was not entitled to the more speedy, more effectual, and we might add, much clearer, and therefore more appropriate and beneficial remedy by mandamus. Within the limits which an ancient and unbroken line of precedents in Great Britain and in our own state had established for its jurisdiction, it is our chief safeguard against the sometimes gross errors and occasionally still grosser abuses of inferior tribunals and magistrates. Instead, therefore, of renouncing this branch of their judicial prero-

gative, which belongs to the Supreme Court of our state as the *ex officio* supervisors of inferior courts and magistrates, it is their duty to guard and defend it, as the highest power confided to them by the laws and the Constitution. Not to enlarge it certainly; as it cannot be denied had gradually been done in reviewing *decisions*, made on *full hearing* by inferior tribunals, and compelling them to come to different conclusions upon matters of *fact and discretion*; but to use it in compelling them to *hear the merits and determine*, where they had illegally refused to hear them and had dismissed the appeal on any pretext whatever.

There is another branch of this jurisdiction by mandamus over inferior courts equally important and well settled upon principle, but not so clearly defined by as great a number of cases and authorities. That is the power of the King's Bench and of our Supreme Court to issue the writ of mandamus to compel an inferior court or magistrate to *enter a particular order*; or to *issue a particular writ or process*, or to do some particular act enjoined upon them by the common law or by statute, where *no legal discretion is left them*. In such cases, if the inferior court, erroneously believing that they have not the power or have a discretion in regard to using it, decline or refuse to do what the law *enjoins authoritatively* upon them, the same jurisdiction exists to compel them by mandamus to obey the imperative requisitions of the law, as to compel them to hear and determine where they have a legal discretion. The cases of *The King v. The Justices of Norfolk*, 4 Barn. and Ad. 238, and of *The King v. The Justices of Somersetshire*, 4 Id. 549, are conclusive on this point, if authorities are needed. In the first, the court admit that a mandamus would be proper to compel the Sessions to commit a church warden for the omission of rendering his account, if the act of parliament had not left the justices a discretion, the expression being "*it shall and may be lawful*" for the justices to commit. Denman, Ch. J. said: "The statute *authorizes* but does not *compel* them to commit. There is no ground, therefore, for issuing a mandamus to the magistrates." In the case of *The Somersetshire Justices*, they allowed a mandamus, after full argument, to *compel* the Sessions to record the rules of a Friendly Society or

saving's bank association under the provisions of an act of parliament, although the justices had on *hearing decided* that they were not entitled to be recorded, because the parties had not conformed to the provisions of the act. The same doctrine is clearly and explicitly admitted by all the judges in the case of *Rex v. The Justices of Buckinghamshire*, 1 Barn. & Cress. 485; and numerous other cases are to be found to the same effect.

Still another class of cases occurs for the legitimate exercise of this jurisdiction by mandamus over inferior courts, judges and magistrates. And it constitutes perhaps the most important as well as the most delicate branch of this judicial prerogative. Those are cases where it is sought to *correct* the decisions, or *vacate* some order or proceeding of an inferior court, judge at chambers, or magistrate which is illegal; either as indirect violation of a statute, or from excess of jurisdiction in regard to the cause, the party, or the subject matter of the decision, order or proceeding; and even from the *want of certain indispensable legal* prerequisites, as *notice* where the law prescribes it, and the like. In all those cases, it is well settled that the Court of King's Bench will interfere by the summary process of mandamus to correct such decisions, vacate such order, and if necessary set aside all such illegal and unauthorized proceedings. The case of *The King v. The Justices of the West Riding of Yorkshire*, 5 Barn. & Ad. 667, is an instance of the exercise of this jurisdiction, in *correcting a decision* of the court below. That was an *appeal* under a statute, of which due notice had been given, and being *respited* to a subsequent session, came on when the appellant applied for further respite. A majority of the bench refusing it, the appellant was proceeding with his appeal, when the respondents called on him to prove his *notice* of appeal for that court. No such notice having been given, the sessions dismissed the appeal. On application for a mandamus, Denman, Ch. J., said, "I have always understood that this court had authority to interfere for the purpose of seeing that no ILLEGAL PRACTICE prevailed at the sessions, to prevent the hearing of an appeal. I think it is pretty evident that by refusing this mandamus

justice would be shut out ; and that we ought therefore to tell the magistrates that they have done wrong in refusing to hear the appeal upon the ground assigned. The rule will therefore be absolute." Patteson, J., said : "The statute requires ten days notice of the appeal to be given in the first instance, but *says nothing as to notice of a respited appeal*. If that is necessary, it must be so either by the practice of the sessions, or by general rules of law. No rule of practice at the sessions has been produced, requiring such notice ; if any had been shown, it might perhaps be too much to say that a decision according to the practice was illegal, and not to be abided by. As to the general rules of law, *Rex v. Lambeth*, 3 D. and R. 340, shows that they do not warrant the demand of such a notice." The effect of this was to correct the decision of the sessions upon a point on which they had no legal *discretion*. The same principle was enforced in the case of *Regina v. The Justices of Merionethshire*, 6 Ad. and Ellis Queen's Bench R. 163. But perhaps the best authority on this point is the case we have already cited, (*ante* p. 366;) for nearly the same principle, *The King v. The Justices of the West Riding of Yorkshire*, (*Sheffield v. Crich*), 5 Q. B. R. 1.

In fine the jurisdiction which we contend for in this particular is, that which was exercised in our own Supreme Court, without challenge or question, in cases like those of *The People ex rel. Fisher v. The N. Y. C. P.* 18 Wend. 534 ; *The People ex rel. Doughty v. The Dutchess C. P.* ; *The People ex rel. Mapes v. The Columbia C. P., &c.* ; until the decision of the Court of Errors in the case of the *Oneida Judges*. It remained unimpaired by the resolution there adopted by the court ; there is nothing even in the opinion of Mr. Senator Tracy, to fright the court from its propriety ; for that opinion was confined to the class of cases then under consideration, in which we do not pretend to uphold their jurisdiction. The veto upon that branch of it for which we contend, has proceeded from the judges of the Supreme Court themselves. But for that voluntary abandonment, it would it is believed, have been still exercised without let or hindrance from any quarter whatever.

In such a jurisdiction, so long and so beneficially used to control inferior tribunals and magistrates, where, having no legal discretion, they refuse to do what the law positively requires, or have done what the law as positively denies them the power to do, there is nothing but a judicial power to enforce the civil rights guarantied to every citizen by the laws and constitution of his state and country. Justice and expediency alike demand that it should not be abrogated or abandoned. It reposes upon foundations of principle and authority which can not be shaken, and ought not to be undermined. Within the boundaries which the law has assigned it, the due administration of justice requires it to be sustained. It is a power of which those judges are trustees for the benefit of the people. It is a limited power, it is true, which they must not exceed, but can not abrogate. It is a sacred trust which they are not at liberty to curtail of its fair proportions, still less to surrender or renounce.

MILITARY BOUNTY LANDS.

WENDELL v. WORDSWORTH, 20 J. R. 659, 5 J. C. R. 224.

*Constructive Notice to Purchaser of Military Lands by
Deposit of Deed ; Chancery Agreement.*

In this case, the Chancellor (Kent) held that a defective conveyance by a person seised in fee at the time is good, so as to bind the lands conveyed in the hands of the grantor and his heirs ; and also good against a subsequent purchaser, with notice of the prior defective deed or conveyance.

Semb. That possession under such a deed will be constructive notice.

He held therefore upon these principles that when a soldier entitled to military bounty land, under the several acts of the legislature, by an instrument in writing, *purporting*

to be under his hand and seal, but to which no seal was affixed, for a valuable consideration, sold, quit-claimed and confirmed to the plaintiff, &c., all his right, title, claim, and demand to and for all the land to which he was entitled, &c., with covenant for further assurance, (no patent then having been issued for the land,) which instrument of conveyance was duly deposited in the office of the clerk of Onondaga county, on the 29th of April, 1805, pursuant to the act of January 8, 1784, and afterward, on the 8th of March, 1799, was duly proved; and the same grantor on the 25th of October, 1796, executed a deed in fee of the same land to P., under whom the defendant claimed title.

That although the first instrument for want of a seal was defective as a legal conveyance, yet it passed all the right and interest of the grantor in equity, the omission of the seal being a mistake, and contrary to the express intention of the parties.

But the Court of Errors held, that the deposit of the instrument in the clerk's office, under the act of January 8, 1794, and the act amending it, March 27, 1794, was not *legal* notice to subsequent purchasers, nor equivalent to a registry of the deed; and P., the second purchaser, was not therefore chargeable with notice of the prior conveyance; and that the plaintiff was not entitled to relief against him, or to a decree for a release from him of his claim and title.

✍ The principles held by the Chancellor in this case, although his decree was reversed, do not seem to be in any degree denied or impaired, so far as they declare that such a defective conveyance binds the lands in the hands of a purchaser, with *actual legal or constructive notice* of it; the Court of Errors differing only with him, as to the effect of the deposit of the deed, in creating such constructive notice, in the particular case.

MORTGAGE.

BERGEN v. BENNETT, 1 C. C. E. 1.*Redemption of Mortgaged Premises. Power of Sale in a Mortgage Deed.*

THIS was an appeal from a decision of Chancellor Lansing, permitting Bennett, the respondent, to redeem lands sold by Bergen, the appellant, at auction under a power of sale contained in the mortgage. The mortgage had been purchased by him of the original mortgagee, and he became the purchaser of the property at the sale. The respondent was the son of the mortgagor, who died in 1776, leaving the respondent, then only fifteen years of age, his oldest son and heir at law. The property was sold in 1784, and bid off by a third person as the agent of Bergen, to whom the latter conveyed the premises, and who immediately re-conveyed them to the appellant.

The Chancellor held that the power of sale contained in the mortgage expired with the life of the mortgagor, and that his heir was not barred of his title by the execution of the power after the death of his ancestor. He therefore decreed that he was entitled to redeem, and that an account should be stated between the parties, &c.

The Court of Errors reversed this decision. The opinion of the court was delivered by Kent, J. He says, "It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion the power contained in the mortgage is of the latter description." He also held, "That the heir was barred of the right to redeem under the circumstances, having waited without any legal disability sixteen years, and only when finding it a gaining bargain, presenting himself to redeem." The decree of the Chancellor was reversed, and the bill to redeem ordered to be dismissed with costs.

GRANT and others, appellants, v. THE BANK OF THE U. S.
and others, respondents, 1 C. C. E. 112.

THE question arose in this case, whether, after the passage of the general registry act of mortgages, a senior mortgagee might *tack* a junior mortgage to his prior one as against an intermediate incumbrancer by mortgage.

Chancellor Lansing held, that the doctrine of thus *tacking* incumbrances was a well established one in England, and was equally entitled to be considered so in our Court of Chancery; and that the provisions of the registry act did not interfere with, or impair the right. On appeal,

The Court of Errors, Spencer, J., delivering the opinion of the court, held, that the registry act having made the registry of mortgages constructive notice to subsequent purchasers and incumbrancers, the doctrine of tacking junior incumbrances to a senior one, to the prejudice of an intermediate mortgagee, was thereby abrogated. But Mr. Justice Spencer expressly admits that but for the registry act, the doctrine would have been in force and to be adhered to, as fully established in England by a long and uninterrupted series of decisions.

¶ See as to *notice* of mortgages registered and unregistered, *Frost v. Beekman*, 1 J. C. R. 288. On appeal, 18 J. R. 544, (post, p. —.) *Dey v. Dunham*, 2 J. C. R. 182. On appeal, 15 J. R. 555, (post, p. —.) *Brinckerhoff v. Lansing*, 4 J. C. R. 65; *James v. Johnson*, 6 J. C. R. 417; *St. Andrew's Church v. Tompkins*, 7 J. C. R. 14; *Richardson v. Rust*, 9 Paige, 243; *Brinckerhoff v. Marvin*, 5 J. C. R. 320; *Lemon v. Staats*, 1 Cow. 592.

See also as to notice to junior mortgagee of prior incumbrance, and his right to be subrogated in place of senior mortgagee; *Banter v. Garmo*, 1 Sandf. Ch. R. 384; 1 *id.* 43; *Craig v. Tappin*, 2 Sandf. Ch. R. 78.

See as to notice of mortgage to *secure future advances*; *Conrad v. Atlantic Ins. Co.*, 1 Peter's R. 386; 7 *Craig*, 34.

NIVEN v. BELKNAP, 2 J. R. 573.

Mortgagor and Mortgagee. Fraudulent Conveyance.

THIS was a bill—*quia timet*—filed by a purchaser against a mortgagor under the following circumstances:

Niven applied to Belknap to purchase a farm, then in possession of Belknap, and was informed by him that John Brush, of Long Island, had a mortgage or mortgages on the farm, and that he had given it up to him in satisfaction, &c., and that Brush had the entire disposal of it, and was to make the best of it, to satisfy himself for the moneys due to him. B. and N. accordingly went to Brush, together, and an agreement was made between Brush and Niven in the presence of B. for the absolute purchase of the farm, and Brush thereupon executed a conveyance in fee to N., who afterwards took possession of the farm as owner, and made considerable improvements. About ten years afterwards the mortgagor made an absolute conveyance of the farm to his own son, who was a neighbor of Niven, whereupon N. filed a bill, *quia timet*, against B. and his son, praying that they might discover the title they pretended to have to the premises, and might be decreed to renounce such pretended claim, or be perpetually enjoined from asserting it to the prejudice of the complainant.

The Chancellor in March, 1806, pronounced the following final decree, (considering the *grantee of the mortgagor* as entitled to redemption, though *not in that suit*.)

"This cause having been heretofore heard, and the opinion of the court having been given, that the complainant's bill was not sustainable, but it being insisted on the part of the defendant that he was entitled to redeem the mortgaged premises, &c. Whereupon further day was given to the parties on that subject; and Mr. Harrison, of counsel for the defendant, consenting to the dismissal of the said bill: Thereupon, &c., ordered. Bill dismissed with costs, &c."

On appeal, this decree was reversed unanimously by the Court of Errors, Thompson, J., delivering the opinion of the court. He says that—"The conduct of Belknap had a direct tendency to deceive and mislead, unless his intention was to

assist the appellant in obtaining an absolute title to the farm." "It cannot, I think, be doubted but that the respondent, B. (the son,) is to be considered in the light of a purchaser *with notice*; and of course the same rule of law and principles of equity apply to him as to Abel B., his father, from whom he purchased."

Decree—"That the son execute and deliver a competent release of all his title, &c., to the appellant, and pay the costs of the appellant in the court below—and that, in case of death so that the release could not be executed, that the Chancellor award a perpetual injunction in favor of appellant, according to the prayer of his bill, &c."

GRANT and others, appellants, *v.* DUANE and others respondents, 9 J. R. 591.

Not reported in Chancery.

Mortgage; Right of Redemption; Presumption of Payment or other Arrangement, in Discharge of Incumbrance.

This was a bill filed by the representatives and heirs of *James Duane*, as a sole surviving trustee, under an assignment of *Shaw* the mortgagor and his two copartners in 1766, in trust for their partnership creditors. The bill was against the representatives, heirs and devisees of *Grant*, who held a mortgage on the premises in question before the assignment of *Shaw* and his partners to *Duane* and his co-trustees: and prayed for a decree that the plaintiffs might have leave to redeem the mortgage and that defendants account for the proceeds of the land which they had sold &c. The heirs of *Shaw* were not parties to the bill.

The facts in support of the title of the complainants as far as material, were to this effect; that under the *assignment* under which *Duane* became the sole trustee, by survivorship, in 1796, he had claimed the premises as his own: and had, it appeared, endeavored to find out *Grant*, the mortgagee, to pay him his mortgage debt. Not succeeding in this he had claimed the ownership and had before his death de-

mised certain of the lands, to tenants that were either then in possession or went in afterwards.

On the part of the defendants, the answer set up the mortgage of the tract, then wild lands, by the owner Shaw, to their ancestor, and testator in 1765, before the assignment. That the mortgagee entered upon the lands on the failure and assignment of Shaw to Duane and his co-trustees, and acted as the proprietor until his death in April, 1796, a period of above 28 years; that during all that time, no money was paid or tendered to him, nor any measure taken to redeem the estate; that several of the settlements and other acts of ownership by him took place within 3 years after the date of the mortgage. They claimed to be *owners* of the premises, and had sold as such and *not under the power of sale in the mortgage*. They also insisted that nothing had ever been done under the assignment, and that after such a lapse of time, the presumption was that the debts of the partnership had been paid out of the partnership property assigned, or satisfied in some other manner. Replication and proof, establishing the principal facts as claimed by the plaintiffs in support of their title; and the foregoing facts to rebut the plaintiffs' claim were proved by the defendants substantially as alleged by them in their answer.

The *Chancellor (Lansing)*, upon these facts, *held* that that the heirs and representatives of Duane were entitled to redeem: that the acts of ownership by Grant, and his possession as mortgagee, were not of such a character as to bar the equity of redemption which had been asserted by Duane and that the acts of Duane in respect to ownership had in some sort countervailed those set up by Duane. He therefore decreed the right of redemption to the plaintiffs, as his heirs &c., and that the defendants account for the lands sold before the filing of the bill, on appeal from this decree.

The *Court of Errors* held, *Thompson J.* delivering the opinion of the court. 1. That the objection that the heirs of *Shaw* were not made parties to the bill, might be insisted on in the Court of Errors, it having been taken in the court below.

2. That the heirs &c. of Duane had shown no subsisting title to redeem and that no person could come into the court

of Chancery for a redemption of a mortgage, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest that the law recognizes, under the title of the mortgagor.

3. That the presumption of law, upon the facts of the case was, that the debts of the partnership had been satisfied out of other property in the deed of the partnership assigning their property, and that if any body therefore was entitled to redeem, it would be the heirs &c., of *Shaw*, the mortgagor.

Thompson, J. in the course of his opinion says. "The mortgaged premises it should be observed were the sole and exclusive property of *Shaw*; not of the grantors jointly, nor is there in the deed any specification of those lands, though there is of other real property. They are comprised in the general descriptive clause in the deed. 'That expressly provides that if the debts can be satisfied by sale of part only of the premises granted, the trustees shall reconvey the residue.' 'The claim to execute this trust, without showing any debts unpaid is against the spirit and intention of this covenant.' "The respondents have failed to show a subsisting interest under the mortgagor, by not showing the existence of any debts yet to be satisfied out of the trust estate. The lapse of time is of itself sufficient to warrant the presumption of an execution of the trust. He concludes as follows :

"This view of the case renders it unnecessary for me to examine whether the equity of redemption is not bound by the lapse of time and the possession held by the mortgagee and his representatives. The case presented is certainly a very strong one on this point. It will be time enough however to decide it, when the heirs of *Shaw* who alone, from any thing that appears, are entitled to redeem, shall think fit to ask a redemption. At present, it is only necessary to decide on the rights of the respondents, and as I am satisfied that they do not show themselves entitled to redeem, I think the decree of the Court of Chancery ought to be reversed.

This being the *unanimous* opinion of the court, the decree was accordingly *reversed*, the respondents' bill ordered to be dismissed with costs &c., in the Court of Chancery to be taxed &c.

DUNHAM v. DEY, 15 J. R. 555.

In Ch. 2 J. C. R. 188.

Recording Deed given as Mortgage; Priority of Mortgage; Notice to purchaser; Defeasance.

THIS was a bill brought by Dey, trustee and assignee of W. and W. to set aside a conveyance which the assignors had previously executed to Dunham the appellant. The deed was recorded and was accompanied by a *defeasance* which was not recorded at the time of the assignment to Dey. The deed was given as a security for the payment of certain promissory notes which *Dunham* had endorsed, for the grantors' accommodation and which were from time to time renewed; they paying or agreeing to pay two and one-half per cent. to Dunham as a commission for his endorsement, but which did not for the time the notes had run, exceed the legal rate of interest. W. and W. becoming embarrassed made an assignment of all their property to Dey, in trust for creditors &c. without a particular description of their real estate in the body of the deed, but a schedule annexed specified certain "*lots of ground* in S. street, the title to which is in David Dunham, as *collateral security to pay certain notes.*" On the hearing of the cause on pleadings and proofs,

The *Chancellor* decreed the conveyance to Dunham to be inoperative as against the assignee. He held the charge of two and one half per cent. commission, not to be usurious, but ordered the deeds to be given up on the ground that the deed with a defeasance which was not recorded, could not operate as a mortgage to take priority of the assignment: that to do so, it must have been recorded *as a mortgage*: that a subsequent purchaser is not bound to search the record of *deeds* to be protected against a mortgage: That the record of an absolute deed, *as such*, is no notice to the purchaser and that a notice which was merely sufficient to put a party on inquiry, is not sufficient to break in on the

registry act; and that the assignee therefore in trust for creditors stands in the character of a *bona fide* purchaser without actual notice of an unregistered mortgage. On appeal from this decree,

The *Court of Errors* reversed the Chancellor's decision: holding that the notice contained in the schedule, that the "title of the lots was in D. D. as *collateral security to pay certain notes*, was sufficient *notice* to the assignee of the existence of the prior mortgage to D. D. though the defeasance was not recorded: and that by having his conveyance first recorded, the assignee could not obtain a priority and defeat the deed given as a mortgage.

✍ The reporter adds the following note to the report of this case. "The only point determined in the court below, declared to be erroneous by the decree of reversal was that, as to the sufficiency of the *notice* (by the schedule) to the respondent of the prior deed to the appellant, the defeasance to which was not recorded at the time of the assignment by the W.'s to Dey the respondent in trust."

This is unquestionably correct, but *the point of notice* was the only one really made and determined in the court below.

As to the question of usury which was moved in the case, that defence came directly before the Supreme Court, in a suit upon one of the notes thus endorsed by Dunham, referred to in the above case. The judge at the circuit having left it to the jury to say whether the commission of two and one half per cent. for endorsing was or not taken with a usurious intent and of evading the statute, the jury found for the defendant Gould. The *Supreme Court* confirmed the verdict, and the *Court of Errors* affirmed the judgment of the Supreme Court. See *Dunham v. Gould*, 16 J. R. 367.

But in the case of *Trotter and others v. Curtis*, 19 J. R. 160, the *Supreme Court* held that where the plaintiff was in the habit of receiving *produce* for the defendant, a country merchant, and transporting it to New York, and accepting his drafts, with the engagement that the produce should

be placed in their warehouse, before the drafts became payable: on which acceptances the plaintiffs charged a commission of *two and one half per cent. on all advances* made by them to meet the drafts, where the defendant had no funds in their hands and interest; the *Supreme Court* held that the commissions were not usurious, but a customary allowance for the trouble and inconvenience of transacting the business.

BEEKMAN, Appellant, v. FROST, GODDARD & KELLOGG,
Respondents, 18 J. R. 544.

In Ch. 1 J. C. R. 288, 296, 304.

Point raised in Court of Errors not made in Court below ; Bill to Redeem Mortgage ; Bona fide Purchaser, without notice and for valuable consideration, no Ground of Relief in Equity, though a good Defence ; Mortgage for \$3000 registered by Mistake of County Clerk for \$300 ; Escrow.

THE bill in this case was filed by the respondents in 1808 stating a purchase by Frost, one of the plaintiffs, and Martin Goddard, since deceased, of a certain lot in Marcellus, in 1803, of Henry Corl; and the intermediate conveyances to the other plaintiff. That the plaintiff discovered on the records in the office of the clerk of the county of Onondaga, a mortgage from Corl to John K. Beekman, the defendant, dated, May 6th, 1803, registered the 5th of September, 1805, to secure the sum of \$300, payable on the 6th of May, 1808, with interest; on discovery of which mortgage, Frost applied to the defendant and offered to pay the sum of \$300 and interest, which was refused; and to the surprise of Frost, the defendant stated that the mortgage in fact was to secure the sum of \$3000, and which sum he demanded, saying there was a mistake in the registry as to the sum. That Frost had no knowledge or suspicion of the mortgage at the time of the delivery of the deeds to him, nor had, as he believed, Martin Goddard any knowledge of it at the time of the delivery of the deeds to him for his share. That Frost and Martin Goddard had sold and conveyed the lands without

any knowledge or suspicion of any other mortgage than one for \$300. The plaintiffs insisted, therefore, that they ought not to be affected beyond the sum expressed in the registry; that valuable improvements have been made on the lot since the purchase from Corl; that the defendant is advertising the lot for sale under the mortgage for the purpose of raising the sum of \$3000, &c. The plaintiff prayed an injunction to restrain all further proceedings on his part, &c.

The defendant's answer stated that he having title to the lot in question sold it to H. Corl, in May 1803, for \$3000 payable in May, 1808; that he about that time signed and sealed a deed for it to Corl, and sent it, (together with a mortgage to be executed by him and his wife, for the purchase money,) to one Westerlo of Albany, as an escrow, to be delivered to Corl, on his executing and registering the mortgage, procuring a certificate from the county clerk of the registry and that there was no other mortgage on the lot, registered. That Corl did accordingly execute the mortgage and produce the certificate of registry; but insisted that the delivery of the deed by Westerlo to him, which then took place, was not valid and binding on the defendant, as Corl's wife did not acknowledge the mortgage; though she had signed it. That Corl having absconded without paying it, the defendant had advertised the lot for sale under the power in the mortgage; that he had no knowledge of the facts stated in the bill; that he first discovered in September, 1807, the mistake of the clerk in registering the mortgage for \$300, instead of \$3000; and he charged that the plaintiffs bought of Corl without any reference to the registry, &c.

The Chancellor held the bill sustainable for *relief*; although that point was not expressly made before him; he also held the mortgage a good and valid one for \$300, and made a decree referring it to one of the Masters of the court, to ascertain and report what sums Henry Corl had received of the purchasers before the 18th day of October, 1807, and what was still due on them: Also, that he report the amount due on the mortgage to the appellant, as for \$3000, and as for \$300, &c., reserving all further questions and directions until the coming in of the report.

From this decree, the defendant below brought his appeal to the Court of Errors; and on the argument, *two* new points were raised, which had not been argued in the court below. 1. That admitting all the facts in their bill, the respondents have no right to *relief* in equity against the appellant's mortgage, whether it were registered or not. 2. That as *bona fide* purchasers, they were not entitled to obtain relief in equity against *another bona fide* purchaser. It was objected that these points, not having been raised in the court below, could not be urged in this court. But the court held otherwise. Mr. Justice Spencer, who delivered the leading opinion, cited the cases of *Gelston v. Hoyt*, 13 J. R. 562, *Lyon v. Tallmadge*, 14 *ibid.* 501, and *Palmer v. Lorillard*, 16 J. R. 348, &c., as establishing the rule, "that where a cause has been defended in a court below and comes here for review, and a point is made which could not be obviated in the court below, by proof or amendment, this court ought not to refuse cognizance of such point," and with this the court concurred. He then proceeds:

"To the first point, whether the facts stated in the bill give the respondents a right to proceed in a court of equity, as plaintiffs, it has been answered that the bill is substantially *a bill to redeem*, and that the facts set forth and the case made out, are of equity jurisdiction, and entitle the respondent to the relief decreed."

"It is certainly an essential part of a bill to redeem a mortgage, that it offer in express terms to pay the amount due with costs. The bill usually states a prior tender of the amount, and a refusal to accept it. It seems to me impossible to consider this as a bill to redeem the mortgage. Its frame and object were to obtain a decree setting aside the appellant's mortgage for any greater amount than the sum for which it was erroneously registered. In terms, it does not pray a redemption of the mortgage, and it omits what I consider an all important averment; the readiness to pay whatever shall be decreed. A bill to redeem operates, in one respect, like a bill to foreclose; for if it be dismissed, in *default of the payment of the money*, at the time specified, it has the precise effect of a foreclosure, and is equivalent to a foreclosure. (2 Madd. 420.)

“The Chancellor never treated this as a bill to redeem; and if the respondents failed in complying with that part of the decree ordering the payment of the money adjudged to be due, it does not draw after it the consequences of a foreclosure. It is an established rule in equity, that relief inconsistent with the specific relief prayed for, can not be given under the general prayer for relief. A bill seeking relief and omitting an essential requisite to constitute it a bill to redeem, can not be so regarded, nor draw after it the consequences incident to such a bill.”

“The foundation of the bill is, that the respondent was taking measures to sell under a power in the mortgage, from Corl, for securing \$3,000, whereas it was registered for \$300 only.

“In *Patterson v. Slaughter*, Amb. 293, Lord Hardwicke laid down the rule to be, that the title of a purchaser for a valuable consideration, is not ground for relief, though it is a good defence. No book of precedents, no treatise on equity, furnishes a case of a bill filed on the ground that there has been a purchaser without notice and for valuable consideration. If the defendant has an equal claim to the protection of a court of equity, to defend his possession, as the plaintiff has to its assistance to assert his right, the court will not interfere on either side. The respondents attempt to make use of the fact of a *bona fide* purchaser for valuable consideration and without notice, as a substantive ground of equity for offensive operations; thus inverting the order of proceeding, and wholly dispensing with the essential part of what is merely a defence; I mean the oath of the purchaser to his plea. These considerations are, I apprehend, sufficient to show that the decree can not be sustained.

“As the case has been argued at large, and as it may save expense and litigation, to have the opinion of the court on the merits, I proceed to examine them. Should the respondents file a bill to redeem the mortgage as registered, on paying the \$300, with interest and costs, the appellant must either avail himself, by answer of the mortgage as one for \$3,000, or file his cross bill to foreclose it as such; the question would then arise, supposing the respondents to be pur-

chasers without notice, what would be the rights of the parties?"

On this point Mr. Justice Spencer concurs with the Chancellor in the opinion that the deed to Corl was well delivered by the appellant's agent; and that it related back so as to validate the conveyance from him to Frost and Goddard. He also concurred with the Chancellor that the respondents were not to be charged with notice of the contents of the mortgage, beyond the sum set forth in the registry, unless actual knowledge is brought home to them. He concludes, "I regret that the bill was not so framed as to enable the court to put an end to the controversy; but justice must be administered on established principles, and according to established forms."

"The decree must be reversed, and the bill dismissed, without prejudice to the respondent's rights."

This was accordingly done, by a vote of 15 for reversal, 10 for aff.

EVERTSON v. BOOTH. Appeal, 19 J. R. 486.

Not reported in Ch.

Mortgage Debtor and Creditor.

IN this case the Court of Errors held, that where a creditor has a lien on two funds, out of which he can satisfy his debt, and a subsequent creditor has a lien on one of them only, the first creditor must resort to the fund which the second creditor can not touch, in order that the second creditor may avail himself of his only security, provided it can be done without injury to the prior creditor, or impairing his rights.

S. P. DORR v. SHAW, 4 J. C. R. 17.

HAWLEY v. MANCIUS, 7 J. C. R. 174, 184.

BUT also held where the *sufficiency* of the fund, to which the junior creditor can not resort, is *doubtful*; or the prior

creditor refuses to run the hazard of obtaining satisfaction of his debt out of that fund, equity will not take from him any part of his security, unless his debt is first paid.

JAMES v. MOREY, 2 Cow. 246.

In Ch. 6 J. C. R. 417.

Appeal; Mortgage; Merger of Equitable in Legal Estate.

THE facts in this case were as follows:

THE defendant, C. Johnson, gave a mortgage to J. O. Wattles, to secure the payment of \$12,000, on the 24th of June, 1817, which was registered the 17th of July, 1817.

On the 2d of August, 1817, a judgment was docketed in favor of Wattles against Johnson for \$2,000. Execution issued on this and three other judgments, (all subsequent to the mortgage,) and on the 20th of April, 1818, the mortgaged premises were sold in separate parcels. One S. purchased the first for \$205, which at the time of sale was worth \$2,000. Wattles himself purchased the residue for \$440, and sheriff's deeds were executed for the premises. No notice appears to have been given at the sale of the claim of Wattles as mortgagee.

On the 9th of November, 1818, Wattles assigned the bond and mortgage to the plaintiff James, as security for his bond to the plaintiff for \$9,331 of the same date, with a warrant of attorney, to enter up judgment thereon, which was done 12th Nov. 1818.

On the 14th of June, 1819, Wattles executed a quit-claim deed to the defendant Morey of all his estate and interest in the mortgaged premises, for the consideration expressed of \$10,000. The deed was absolute on the face of it, and was acknowledged 21st of July, 1819, and recorded as a deed, the 13th of January, 1821. It was however intended as a security to Morey against an endorsement for a note of Wattles for \$5,000, and for his indemnity against a bond executed with Wattles to one Granger. At the time of executing this deed, Wattles also delivered to Morey, the sheriff's deeds

to him and Sabin the other purchaser; and a quit-claim deed from the latter to him, W., dated May 26, 1819, which was recorded January 13, 1821.

Morey the defendant took possession of the mortgaged premises, and still continues in possession, holding the lands under these deeds, as a security for what was due to him.

The bill of James prayed for a foreclosure of the mortgage of Johnson assigned to him, and that Wattles' deed to Morey, of June, 1819, might be delivered up to be cancelled and for general relief.

The defendant Morey, (bill having been taken *pro. con.* against Johnson,) claimed to be a *bona fide* purchaser, and denied all notice of the assignment of the bond and mortgage to the plaintiff, until some time in the autumn of 1820.

Upon these facts, Chancellor Kent held, that the whole estate legal and equitable, vested in Wattles by his purchases at the sheriff's sale, and from Sabin; and that by the merger of the equitable in the legal, the mortgage of Johnson was extinguished as a security in the hands of Wattles, and was not nor could be revived by the assignment to James the plaintiff.

He therefore decreed that Morey's deed should stand good as a security for what was due to him, and if any residue, that it should be applied to the plaintiff's debt and costs.

The Court of Errors reversed this decision, Woodworth, J., Sutherland, J., and Savage, Ch. J., all delivering opinions in favor of reversal, and holding:

1. That the rule as to *merger*, though inflexible at law was not so in equity.

2. That the mortgagee, in this case, having elected by the assignment of the bond and mortgage, to keep the equitable and legal estates, distinct, the plaintiff acquired a good title to them, as assignee, and was entitled to a priority as assignee for the amount due to him.

Savage, Ch. J., took a somewhat different view, as to the three-fourths bought in by Wattles himself, holding that Morey's deed not being recorded as a mortgage, but as an absolute deed, must be considered as an unregistered mort-

gage, and that as the parties were equal in point of negligence, the rule *prior in tempore, potior in jure*, must apply.

MARTIN v. VEDDER, 5 Cow. 671.

Not reported in court below.

Application of Payment.

IN this case, where the mortgagor had delivered to the mortgagee personally, a sum of money due on the mortgage with an intention to pay and have it applied to that purpose only, and the same money was shortly after delivered back to the mortgagor, to keep and use it; the Chancellor (Kent) held that it did not operate as a payment to extinguish the lien of the mortgage, but he held it to be a temporary *advance* of money by the debtor to the creditor, which did not disturb or impair the lien of the mortgage. But, on appeal,

The Court of Errors held, that such a delivery of the money with an intention to pay, operates as a payment, without a receipt or an endorsement on the mortgage, or collateral security; and the re-delivery of the money to the mortgagor by the mortgagee, should be construed as a loan on the personal security of the mortgagor, and the lien of the mortgage as to the sum paid, can not be revived by the agreement of the mortgagor and mortgagee, as to third persons who hold *bona fide* incumbrances on the mortgaged premises.

Per Savage, Chief Justice. "When a debtor *advances* money to his creditor, which is intended by both parties to be applied on the debt due, it is but another name for payment."

Decree of Chancellor *reversed* accordingly.

See *Banter v. Garmo*, 1 Sanford's Ch. R. 384.

Lansing v. Woodworth, " 43.

Craig v. Tappen, 2 " 78.

WEBB v. RICE, 6 Hill, 219.
In S. Ct. 1 Hill, 606.

Mortgage; Parol Evidence to Prove Deed a Mortgage.

EJECTMENT. The defendants offered to prove by parol, and without showing any written defeasance, that the deed to the plaintiff was intended merely as a mortgage, and the judge admitted the evidence. Declarations of the plaintiff to that effect were proved, and Moore the grantee, was examined as a witness, who proved that the deed was intended to secure the plaintiff against an endorsement made for his accommodation. Bill of exceptions. Verdict for defendants.

The Supreme Court held the evidence admissible, Bronson, J., *dissentiente*.

The Court of Errors *reversed* the judgment of the Supreme Court, holding that parol evidence was not admissible in a court of law, to show that a deed, absolute on its face, was intended as a *mortgage*. The question whether even admissible in a court of equity, except on the ground of fraud, mistake or surprise, was raised, but not decided.

Judgment *reversed*, 2 only voting for *affirmance*.

POST and others v. ARNOTT, 2 Denio, 344-362.
In S. Ct. 6 Hill, 65.

Mortgage; Tender; Ejectment.

EJECTMENT. The action was brought by a purchaser at a sheriff's sale of the mortgage premises sold under a judgment docketed *three months after the mortgage*. The mortgagee foreclosed the mortgage, (dated in May, 1827,) by a statute foreclosure, in 1830. In 1836, the judgment creditor, (whose rights are by the statute "not to be prejudiced by any such sale, nor in any way affected thereby,") issued a *fi. fa.* on his judgment, and the premises were sold under it to A. the defendant in error. The deed of the sheriff to him was dated May 23d, 1838. On the 21st of Septem-

ber, he tendered to the mortgagee, who had bought the premises at the foreclosure sale, the principal and interest with costs of foreclosure, which the mortgagee refused to receive, whereupon the defendant in error brought ejectment.

The Supreme Court held that the action might be maintained. That the tender discharged the lien and divested his title under the foreclosure; that, as a tender to the mortgagee or his assignee, at any time before foreclosure, although the law day has passed, would have the effect of discharging the lien of the mortgage, and as by the statute, the rights of the judgment creditor were not affected by the sale; the tender was sufficient to discharge the lien, even as against the purchaser at the *foreclosure sale*.

The Court of Errors held that the *action of ejectment* could not be sustained; that the tender after foreclosure did not discharge the lien, *ipso facto*, so as to vest the title in the purchaser at the sheriff's sale, and that his proper remedy appeared to be by bill in equity, where equitable conditions might be imposed, and the interest of all parties protected. p. 348.

Judgment *reversed*, 11 to 9.

PARTNERSHIP.

SWIFT, appellant *v.* DEAN, respondent, 6 J. R. 522.

Injunction; Misapplication of Partnership Property, assigned to pay Partnership Debt.

THE decision of the Chancellor (Lansing) in this case was reversed; but it would seem by his opinion, (6 J. R. 527,) that his decree dismissing the appellant's bill with costs was rather founded on the defect of proof, that any copartnership property was put into the hands of the respondent to pay the debts of such copartnership, or the particular one mentioned in the bill, than on any legal ground.

The Court of Errors *reversed* the judgment, Thompson, J., delivering the opinion. The facts were as follows:

A. and B., being partners in trade, in 1788, and 1789, and indebted to C., dissolved their partnership in 1789, and A. undertook to pay the partnership debts, and particularly the debt due to C. and received the partnership property for that purpose. A. in 1789, executed a bond and warrant of attorney to C., to which he put his own name and seal, and the name and seal of B. In 1782, B. sold a piece of land to D., with covenants of seisin and warranty, and in 1795, D. sold and conveyed the same land to E., the appellant. A judgment having been entered up by virtue of the warrant of attorney in favor of C. against A. and B., a *fi. fa.* was issued thereon, by virtue of which the land was seized and sold, and A., became the purchaser at the sheriff's sale.

E. the appellant, then filed his bill in Chancery against A., to set aside the judgment, execution, and sale, as fraudulent, on the ground that the judgment was entered without any warrant or authority from B. The allegations of the bill were denied by A.'s answer, and there being but *one* witness to support the bill.

The Court of Errors held, that the judgment could not be set aside; but that A., appearing to be the only person interested in the judgment, and having received property with which to pay the debt due to C., A. ought to be enjoined from proceeding under the judgment, or from bringing any action of ejectment in his own name, or in the name of C., until he fully accounted for the disposition of the property he had received.

B. having given a warranty deed for the land, he was held an incompetent witness on the ground of interest. Decree of the Chancellor *reversed*, and injunction decreed against A., but without prejudice to the right of C. under the judgment.

BAKER v. STACKPOOLE, 9 Cow. 420.

Not reported in S. Ct.

Partner ; Evidence ; Payment.

THE Court of Errors decided in this case :

1. That the admissions of one partner, either of an account or of any fact, made after the dissolution of the partnership, are not admissible as evidence to affect any other member of the firm.

2. That a person indebted to the same creditor on different accounts or demands, and making payment, may direct the payment to be applied to which account or demand he pleases ; and if he fails to make the application, the creditor may make it at his option.

3. That where neither party has made such an appropriation, the law will do it upon certain rules of presumption. Where A. has a demand against B. and C., and a more recent demand against B. alone, who makes an indefinite payment ; *it seems* that the law will appropriate it first to the *individual* demand, and then the residue, if any, to the joint demand ; though if B. were the sole debtor, it would *it seems* appropriate it to the oldest debt, in the first instance. But in such case the creditor can not wait after the payment, until B. may become farther indebted, and then apply the payment to the demand created since the payment, leaving the previous demand unpaid ; in no case can a general payment be thus retained and applied to a demand afterward created, leaving the prior one unsatisfied.

See *Pattison v. Hull*, 9 Cow. 747, and note (b.) thereto.

✍ The judgment of the Supreme Court in this case would seem to have been *reversed* mainly on the first and third grounds, as it is not probable that the second point could have been otherwise decided by the Supreme Court, than by the Court of Errors.

HALLIDAY v. M'DOUGALL, 22 Wend. 264.

Not reported in S. Ct.

Evidence of Partnership.

IN this case, the Supreme Court held, that where a suit was brought against three partners as drawers of a bill of exchange, the plaintiff was bound to establish the partnership as to a defendant, returned "not found," and that reputation alone was not sufficient to prove it.

The Court of Errors held, that in such an action, where one only was brought in, and the others returned not found, it is sufficient to show that the defendant served, is a member of the firm upon whose contract the action is brought; it is not necessary in such case to prove that the other defendants were members of the firm.

A bill of exchange drawn on *one* of the states of the Union, payable in *another*, is regarded as a foreign bill, and a notarial protest is *prima facie* evidence of its contents.

EVANS v. WELLS, 22 Wend. 324.

Reported 20 Wend. 251.

*Partners; Sealed Power of Attorney by One for Firm;
Release; Accord and Satisfaction.*

ERROR to Supreme Court. Action below; assumpsit by Wells and Spring against Evans and partners on promissory note.

The Supreme Court held in this case, that where one of the partners alone executed a sealed power of attorney for the partnership, signing it thus: "Marcus Spring for Wells and Spring," to certain agents, to demand and receive, compromise and discharge all sums of money due to the firm from the endorser of the note in question, and on receipt of such moneys, to execute acquittances and discharges; that the release by the attorneys, upon a compromise with the endorser, in their names and without naming the principal in the release, was void and not binding on the principal;

and that parol proof was inadmissible to show an adoption of the act, by the principal receiving the *consideration* of the release, but *seemed* to hold that such evidence was admissible to show payment in whole or in part of the demand of the principal.

They also held that although one partner can not bind his copartner by seal, where the effect of the instrument is to charge the firm, yet it is competent to him by such an instrument under seal, to authorize a third person to discharge a debt due to the firm.

In the Court of Errors, the Chancellor in an opinion delivered by him, says: "The only real question for consideration is, whether the evidence offered was sufficient to establish a technical release of the debt or an accord and satisfaction," and he holds that "as it was not executed by the agents in the names of the plaintiffs, or either of them, or by themselves as agents or attorneys of the plaintiffs, and the latter not even named or alluded to in the instrument, it was void as a release, and could not be made good by a subsequent parol ratification;" for which latter point he cites Story on Agency, 239, § 242. Also, that as a parol agreement for the release of the debt, without satisfaction or on receiving part only, it was not valid at law, or in equity; parol evidence to show that such a void release was so intended, was inadmissible; also, that the evidence was insufficient to show an accord and satisfaction of the debt; and was for *affirming* the judgment.

But a majority of the court held otherwise, and that though the instrument offered in evidence as a release was not binding upon the principals as such, and could not be set up in bar of a recovery for the original debt; yet it was further held that it was competent to the debtor for the purpose of establishing an accord and satisfaction, to prove by parol, a *ratification* by the principal of the acts of his agent; by showing that with full knowledge of the facts, he had reaped the benefit of the compromise by accepting in whole or in part its fruits; and for that purpose to produce the release as *evidence of the agreement*, and show a compliance on his part with its requirements. Senator Verplanck delivered the opinion of a majority of the court, which was concurred

in by a vote of 13 to 6, and the judgment was accordingly reversed, and a *venire de novo* awarded.

PLEADING.

BAYARD *v.* MALCOLM, 2 J. R. 550.

In S. Ct., 1 J. R. 453.

Pleading. When Defect is aided by Verdict.

ACTION for deceit in the sale of a Newspaper establishment.

The Supreme Court held, (Livingston, J., *dissentiente*), that in action for a deceit in the sale of a Newspaper establishment, by false representations of its condition, &c., the want of an allegation of a *fraudulent misrepresentation* or a *scienter* in the declaration, was not helped by verdict; and the judgment was accordingly arrested by the S. Ct. But

The Court of Errors held, on the other hand, that the allegation in the declaration—"and so the said S. B. says that he by reason of the said affirmation of the said R. M. Malcolm," (stating the false representation,) "*was falsely and fraudulently deceived*," was sufficient, at least after verdict, and reversed the judgment of the Supreme Court.

TILLOTSON *v.* CHEETHAM, 5 J. R. 430.

In S. Ct., 2 J. R. 63.

Libel; Amendment of Record; Practice; Defective Declaration when aided by Verdict.

ACTION for a libel. In this case, before the hearing on the writ of error, a motion was made to the Court of Errors, (reported 4 J. R. 499,) to amend the record by sending the transcript down to the Supreme Court, where the record had

been amended, since the writ of error was brought, by striking out or entering a *nolle prosequi* on *one* count of the declaration.

The Court of Errors held that the transcript ought not to be sent back to be amended, but that the Court of Errors itself might amend the record, or award a *certiorari* to bring up the record from below, and the motion to send back the transcript was *denied*. (See note to report of this case, 4 J. R. 509.)

On the argument of the writ of error, on the merits, the Court of Errors held, that the judgment of the Supreme Court must be reversed, on the ground that the second count of the declaration was essentially defective, and as the plaintiff had judgment on the counts *generally*, it was error, and the record not susceptible of amendment, so as to cure the defect.

Judgment reversed.

[It was also made a question in the Court of Errors, whether the declaration contained one count only, or two distinct counts. The court held that there were two counts.]

BACKUS v. RICHARDSON, 5 J. R. 476.

Not reported in court below.

Slander ; Defective Count, and Damages assessed generally.

ACTION for slander, and demurrer to the whole declaration containing several counts for different words, some actionable and others not. The plaintiff's damages were assessed generally, and the Court of Errors, on writ of error, held, as in *Cheetham* and *Tillotson*, that the damages must be considered as applying to the whole declaration, and the judgment of the Supreme Court sustaining the verdict, under those circumstances, was accordingly *reversed*.

¶ *It seems* to have been held by the Court of Errors in

this case, that to say of a merchant, "You keep false books, and I can prove it," is actionable.

UTICA INSURANCE COMPANY v. SCOTT, 8 Cowen, 709.

In S. Ct., 19 J. R. 1.

Pleading.

IN an action by the Utica Insurance Company (incorporated) against the endorser of a promissory note, he pleaded "That the plaintiffs contrary to the act, (restraining private banking,) subscribed to and became members of an association, institution or company, and became proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, and making discounts, and transacting all other business which incorporated banks may and do transact by virtue of their respective acts of incorporation; that for this purpose, they established an office or banking house, and issued notes, received deposits, and made discounts, as incorporated banks may, &c., and averred that the note in question was made for the purpose of being and was discounted at their office, they knowing the purpose for which it was made." The plaintiffs replied the act constituting them a corporation, which authorized them to *loan their surplus funds*; and alleged that they lent a part of their surplus funds on the security of the note, showing the particulars: *without this*, that the plaintiffs had subscribed to or became members of an association, &c., as set out in the plea—for the purpose in the plea set forth: concluding with a verification. *Special Demurrer*, assigning for cause that the plaintiffs had not in their replication confessed or avoided, traversed or denied, that they illegally and wrongfully established an office or banking house, and issued notes, received deposits, &c., as stated in the plea.

The Supreme Court held, that the replication was bad, for not traversing or denying these facts.

The Court of Errors held, that it was not necessary to traverse or deny those facts, as the facts replied in the in-

ducement to the traverse, were sufficient to sustain the plaintiff's action—and they reversed the judgment of the Supreme Court.

For reversal, 19; aff. 7.

CHAMBERLIN v. GORHAM, 20 J. R. 744.

In S. C., reported 20 J. R. 144.

Pleading; Notice of Set-Off.

ASSUMPSIT on promissory notes not negotiable. The notice of set-off stated that the defendant would give in evidence on the trial, that the notes on which the suit was brought were given for the consideration of the sale and conveyance of a certain piece of land, &c., and that when the notes were given, the plaintiff executed and delivered to the defendant a covenant that if there should be any outstanding judgments, which operated as a lien on the land conveyed, and the grantee should be obliged to pay the same, the amount should be deducted from the notes, &c., and that at the time, &c., there were divers judgments outstanding against the plaintiff which the defendant was obliged to pay and did pay, to prevent a sale of the land, and which sums amounted to \$500 in the whole.

The Supreme Court held, that this notice of set-off was defective in not specifying the judgments, and that the defendant was precluded under it from proving them, and the payment of them, by him. But

The Court of Errors, (Kent, Chancellor, delivering the opinion of the Court,) held, that the notice of set-off was sufficient, as it contained such a statement of the special matter as prevented the plaintiff from being taken by surprise at the trial.

Judgment reversed accordingly.

CLOSE v. STEWART, 4 Wend. 95.

In S. Ct., 1 Wend. 438.

Pleading in Justice's Court ; Former Recovery.

IN this case the Supreme Court held, that whenever the court can possibly intend that the merits have been fairly tried in *justices' courts*, they will not examine or test the pleadings by technical rules, as to the formality of pleading ; but, if it clearly appear that the plaintiff below had no right to recover, the court will reverse the judgment, notwithstanding a jury have found for the plaintiff. In this case, the action was commenced in a justice's court, and removed into the Common Pleas by appeal. The defendant pleaded a former recovery for the same cause of action, and a payment of the judgment. The plaintiff replied, that the former judgment had been reversed on *certiorari*. The defendant to this rejoined, that the money paid on the judgment had not been recovered back. To which the plaintiff demurred, and defendant joined in demurrer.

The Supreme Court decided that the plea was substantially a plea of payment ; that the payment under the judgment, was a satisfaction of the original demand, whether the judgment was reversed or not, if the defendant elected not to call on the plaintiff to restore the money and directed it to be retained as a payment of the plaintiff's demand ; and that the defendant could not afterwards rightfully call on the plaintiff to restore the identical money which he had thus applied. The court therefore reversed the judgment rendered on a verdict for the plaintiff on an issue of fact, holding that the defendant was entitled to judgment on the issue in law, the plea going to the whole cause of action.

The Court of Errors held, however, that although the first judgment was reversed for defect of form merely, and restitution and costs of reversal, awarded to the defendant ; yet that he could not plead the payment made by him on the erroneous judgment, in bar to a second suit for the original cause of action.

Judgment reversed.

GARR v. GOMEZ, 9 Wend. 649-679.

In S. Ct. 6 Wend. 583.

Pleading ; Error ; Verdict on Defective Counts ; Costs on Reversal.

ACTION of assumpsit on an award. On the main point in this case, to wit, whether the plea to the first count of the declaration, that the plaintiff assigned all his estate, real and personal, &c., to an assignee, appointed on his application for a discharge under the insolvent law, previous to the making of the award, by which the defendant was bound to account to Gomez for certain moneys in his hands, was a good plea?

The Supreme Court held it bad on general demurrer, and that the award directing payment to him was good; that the arbitrator had not exceeded his authority, and that the order as to costs, if not within the submission, being void only *pro tanto*, did not avoid the award as to the residue. This part of the decision was affirmed in the Court of Errors.

But the Court of Errors held, the plea to two other counts, 2d and 3d, which plea alleged that he *assigned* all, &c., as an insolvent debtor to an assignee, &c., after the *making of the promises* set forth in the declaration, was good, although the promises are laid in the declaration as of a day subsequent to the discharge; the day laid in the declaration not being material, the averment in the plea must be taken to be true on demurrer.

The Court of Errors also held, that contingent damages having been assessed by a general verdict on all the counts, where one is adjudged bad on demurrer, leave will not be given by a court of review, to enter a *no! pros.* as to such count; and where there is a general verdict and judgment, on several counts, some good and some bad, the judgment will be *reversed*, although the presumption is, that damages were assessed on the good counts only; but in such case the costs of the writ of error will not be given to the plaintiff in error. *Venire de novo* awarded: the plaintiff below to pay the costs of the former trial.

The defendant (plaintiff in error) urging that it must be a mere judgment of *reversal*, and not a *venire*, &c.

The court considered the point and made an order of *reversal* as follows: "That the final judgment of the S. Ct. be *reversed*; that the plea to the 2d and 3d counts was adjudged to be good, but the *plea to the first to be bad*. That so much of the judgment of the Supreme Court as held the plea to the 2d and 3d counts *bad* be *reversed*. That the rest of the judgment be affirmed, and that as to the 2d and 3d counts, defendant go thereof without a day. *Venire de novo* to issue to try the issue and assess damages on the first count.

This was subsequently on motion so modified as to give the plaintiff leave to apply to the Supreme Court to amend his plea to that count, or to put in a new plea, upon such terms as the Supreme Court should think proper to direct.

Judgment accordingly.

DE GROOT v. VAN DUSER, 20 Wend. 390.

In S. Ct. 17 Wend. 172.

Pleading; Restraining Act; Foreign Banking Company.

IN this case, the Supreme Court held that an "agreement to redeem the notes or bills of a foreign bank at an office kept by such bank in this state, is not a violation of the statute prohibiting unauthorized associations from keeping an office for the purpose of receiving deposits or discounting notes or bills, or issuing any evidence of debt to be loaned or put in circulation as money," and such agreement may be enforced by action. Such a contract is valid, although made by the president of a bank for the benefit of the bank in giving additional circulation to its bills in this state, and as the agreement does not bind the contractor to redeem bills prohibited to be circulated in the state, it will not avoid the contract, if he should be required to redeem such bills by the other contracting party.

A contract, innocent in itself, will not be avoided because it may by possibility facilitate an illegal transaction; to ren-

der it void, the connection with the illegal transaction must be direct and not remote or conjectural: but

The Court of Errors held, that as the plea alleging the illegal tendency and object of the contract averred that the agreement was entered into to aid the company in their business at their office in Wall St., for the purpose of discounting, &c., and that it did better enable the company to carry on their illegal operations, the fact must be taken to be true, that the averment was not of an impossible fact, and that the plaintiff should not have deprived the defendant of proving it by demurring to the plea, if he contested its possibility.

Upon the first vote taken, a majority of the members present were for affirming the judgment of the Supreme Court, when it was discovered that a quorum was not present; and at the subsequent meeting of the court, the judgment was *reversed* by a vote of 14 to 6.

LOVETT v. PELL, 22 Wend. 369.

In S. Ct. 19 id. 546.

Pleading ; Misjoinder of Counts.

THE plaintiff in error sued Pell in the New York Common Pleas, in covenant upon a sealed instrument, by which defendant guaranteed the payment of rent to accrue from a third person. With this he joined the common money counts in *assumpsit*. Defendant pleaded *non est factum* to the first count, and *non assumpsit* to the others. The jury found both issues in favor of the plaintiff. Upon writ of error, the Supreme Court reversed the judgment of the Common Pleas, and now on writ of error brought to this court, the court held that,

Error would not lie, since the Rev. Stat. by which it is provided that after verdict, a judgment shall not be *reversed* for mispleading, for a misjoinder of counts; but the mistake must be taken advantage of by demurrer. They also held, that the special assignment of errors in this case, "that the issues joined were not tried, was bad, as it impeached the

record ; and that the joinder in error was not a confession of the fact assigned as error, but operated as a demurrer.

POWER.

MACOMB v. WALDRON AND WIFE, 7 Hill, 335.

In S. Ct. 1 id. 111.

Power to Sell ; Contract for Sale of Lands.

EJECTMENT.

This case seems to have been decided in the Court of Errors upon the single point, noticed by the reporter in his marginal note—which note, with the opinion of the Chancellor, will present the question fully ; the facts were these.

“A naked power to *sell* lands was given by the will of E. to his executor, accompanied with a direction that the moneys arising from the sale should be invested for the benefit of certain devisees in remainder. Macomb, who claimed that the whole equitable title was in him at the time of E.'s death, by virtue of a contract of sale entered into and performed several years before, took a deed from the executrix, which recited the power, together with the facts relating to the contract of sale, and a pecuniary consideration of \$750.

The Supreme Court held that the executor's deed gave no title.

The Court of Errors held, in ejectment by the plaintiffs below, claiming under E. that the deed was a valid execution of the power, though the lands independent of the contract of sale, were worth \$10,000 ; it appearing that the recitals in the deed of the executrix, were true, and that the sale was made in good faith.

The Chancellor observed “that if time was not material under the covenant between M. E. (the vendor) and D. H. (from whom Macomb acquired his right to the equitable title ; and the covenant was in force when the former died ;

so that a specific performance could be decreed; upon which question he said he would express no opinion;") then M. E., the younger, (under whom the plaintiffs below claimed,) had the mere legal title on the death of M. E. and \$750, was the whole value of his interest in the premises, and much more. That if this question were one of doubt, and the executrix sold for what the title was believed to be worth, subject to the risk of the litigation which might ensue as to its nature, and the power was executed in good faith and without fraud, the plaintiffs below could not recover upon the ground that the sale was for less than the value of a perfect title. And that if by a *mistake of law* on the part of the executrix and her grantee, a sale was made under the power for less than the true value of the title, this was no fraud; and if the plaintiffs below had any relief, which is at least doubtful, it must be in equity for the deficiency in the value.

The Court *reversed* the judgment of the Supreme Court, by a vote of 18 for, and one senator against *reversal*.

PUBLIC RECEIVING OFFICER.

THE SUPERVISORS OF ALBANY COUNTY *v.* DORR AND
HIS SURETIES, 7 Hill, 583.*

In Supreme Court, 25 Wend. 440.

Public Officer; How far Liable for Money Stolen from his Office, without Imputation of Negligence or Default.

THIS was a suit on an official bond of Dorr, as treasurer of the County of Albany, with sureties for the faithful dis-

* We give this case, though one of *affirmance*, for reasons which will appear by the note of the reporter subjoined and by the vote of the Court of Errors on the question of reversal.

charge of his duties as *County Treasurer*. The condition of the bond was that Dorr "should faithfully execute the duties of the office, and should pay according to law all moneys which shall come to his hands and render a just and true account, &c. when thereto required &c. The breaches alleged were that he had not *paid over* the sum of \$2500, and that he *had not accounted, &c.*

The defendant Dorr, pleaded that he had rendered a just and true account, &c., and had *paid over according to law* all moneys which had come to his hands as county treasurer *except the sum* of \$1129, which being the identical moneys received by him as county treasurer at his office in the city of Albany, and before he was requested to pay out the same was on the night of 11th March, 1839, *feloniously stolen* from his office, without any negligence, want of due care or other blame, or fault whatever on his part. To this plea the plaintiffs demurred.

The Supreme Court held, Nelson, Ch. J. delivering the opinion of the court. That the defendant was not responsible for the money thus stolen from his office. That he was not an *insurer, ex virtute officii*, while the money necessarily remained in his custody. The cases principally relied on by C. J. Nelson, are *Lane v. Cotton and Frankland*, 1 Ld. Raym. 646, and *Whitfield v. Le Despenser*, Cowp. 574, which require, to subject the public officer, proof of *misconduct or neglect* in the execution of his duties. [He cites also 7 Cranch, 242, the case of *Dunlop v. Munroe*, which, however, does not seem very applicable to the issue presented on the demurrer in this case.]

The Court of Errors were *equally* divided, 12 to 12 on the question being put, "Shall this judgment be reversed?" and the effect of this was to *affirm* the judgment.

Chancellor Walworth and two senators delivered opinions not reported, in favor of affirmance and 3 Senators for reversal.

[The reporter says, in his marginal note. "The affirmance

however, has no binding force as a precedent, and the case has since it seems been overruled. See note.*

✎ This dictum of the reporter may perhaps be safely enough assented to; as the affirmance in this case did not acquire the full force of a *precedent*, in settling the question, so that the Court of Errors would hold itself precluded from re-examining it when it should be again presented to them. But what he says in the note below upon the subject of its being since settled *directly the other way* by the case of *Muzzy, Supervisor v. Shattuck*, seems to a certain extent, unsupported by the opinion of Jewett, J. 1 Denio, 233. He makes no other reference or allusion to that case, than to say; "It is supposed that the principle of this case was decided in favor of the defendants, in the case of the *Supervisors of Albany v. Dorr*, and others 25 Wend. 444." Without stopping to discuss the question, the learned judge then proceeds to show from the various sections of the statute what are the legal liabilities of the *collector of a town* and his sureties: and he seems to hold that the collector is liable under the statute provision, "as a *debtor*, if he have not collected and paid over; and that he and his sureties are therefore liable, whether the omission is the result of misfeasance or neglect, unavoidable accident or felony committed by another." He held the second plea also bad in not averring that the *identical money*

* Note by the reporter. Although the effect of this equal division of opinion among the members of the court was to affirm the judgment of the court below, yet the affirmance did not settle the question of law, and has no binding force as a precedent. *Bridge v. Johnson*, 5 Wend. 342, 372 to 375, and the cases there cited. *Ram on Legal Judgments*, 18. Indeed the law seems to have been settled since, and properly it is believed, directly the other way, by the case of *Muzzy, Supervisor v. Shattuck and others*, 1 Denio, 233, decided by the Supreme Court in May, 1845. That decision, which appears to be utterly irreconcilable with the one reported in the text; was subsequently reviewed by the court for the Correction of Errors, and in December, 1846, was unanimously affirmed. A similar decision was made in the Supreme Court of the United States, in January, 1845. The question arose in an action on the official bond of the receiver of public moneys at Chicago. *The United States v. Prescott and others*, 3 Howard's Rep. 578.

collected had been stolen: and in this it is distinguishable from the case of *Dorr*.

In the case of *The United States v. Prescott and others*, the plea was in substance the same as that in the case of *Muzzy v. Shattuck*, and did not aver as in the case of *Dorr*, that "the *identical money* was stolen, without any negligence, want of due care or other blame or fault whatever on his part." On the contrary the plea simply averred that as receiver of public moneys the defendant had "used *ordinary care and diligence*, in the safe keeping of the same &c."

Mr. Justice McLean, however, who delivered the opinion of the court, it must be admitted, places the case upon grounds broad enough to cover not only the case of *Muzzy v. Shattuck*, which it most resembles, but also that of *Dorr*. He says "There is no principle on which such defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required, can discharge the bond."

"Public policy requires that every depository of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that "he should keep safely," the moneys which come to his hands. Any relaxation of this condition would open a door to fraud, which might be practised with impunity. As every depository receives the office with a full knowledge of its responsibilities, he cannot in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

RENT.

WEBBER & CODY v. SHEARMAN, 2 Denio, 362.

In S. Ct., 6 Hill, 20.

Right of Distress after Expiration of six months from the end of the term, where a new lease is given.

THE Supreme Court held in this case, that if a tenant remain in the occupation of premises for several successive years under distinct demises from year to year, executed by the same landlord, the whole period will be regarded as one term, for the purpose of continuing the right of distress.

Accordingly, where on the expiration of a demise under seal for a year, the landlord executed a new lease to the tenant for another year at a different rent, and on the expiration of the latter, the term was extended by agreement for a third year; Held by the Supreme Court, that the landlord might distrain during the *third* year for rent which fell due at the end of the first.

An avowry in replevin, that the goods were taken by way of distress for rent, need not expressly show that the distress was made by an officer, nor that the proper affidavit was annexed to the warrant.

Semble; per Cowen, J., that the warrant, though regular on its face will not protect the officer who executed it, if the landlord had no right to distrain.

Judgment for defendant, overruling the demurrer to the replications, but gave judgment for the landlord, upon the whole record, and awarded a return of the property replevied to him. The plaintiff below brought error.

The Court of Errors held, that the right to distrain terminated at the expiration of six months from the end of the first term, and is not continued by the execution of a new lease to the same tenant for a further term and a different rent, commencing at the end of the first; and that the land-

lord, in this case, could not distrain for rent in the third year which fell due at the end of the first term.

Judgment reversed ; 20 for reversal, 2 for affir. 1

REPLEVIN.

BEMUS v. BEEKMAN, 3 Wend. 667.

In S. Ct., BEEKMAN v. BEMUS, 7 Cow. 29.

Replevin. Amendment of Verdict. Defective Verdict.

IN replevin—the jury found for the plaintiff, but omitted to find *costs* or *damages*. The Circuit Judge, after they had separated, allowed “*six cents costs*” to be added by the clerk, and referred it to the Supreme Court, whether it might be amended as to the damages. The Supreme Court allowed the “*six cents*” to be added to the verdict for damages ; and also held, that the amendment of “*six cents costs*” was rightfully allowed by the Circuit Judge. On writ of error,

The Court of Errors held, that a plea of property having been interposed, as well as a plea of *non cepit*, a verdict for the plaintiff upon the plea of *non cepit*, determines nothing between the parties except the *taking*, and the plaintiff is not entitled to recover unless the other issue be also found for him. 3 Wend. 667.

The jury found for the plaintiff on the plea of *non cepit*, but assessed no damages ; and on the plea of *property*, found that it was not in the defendant, but did not find it in the plaintiff ; and the Court of Errors held, that the verdict was defective in substance, and that the court was not authorized to amend it by adding nominal damages to the finding of the jury.

Judgment *reversed*.

See SPRAGUE v. KNEELAND, 12 Wend. 161.

BOYNTON v. PAGE, 13 Wend. 425.

NOTE.—In this case, a party to the writ of error having died after joinder in error, the judgment in error was directed to be entered *nunc pro tunc*; as of a term previous to the death.

MILLER v. ADSIT, 16 Wend. 335.

Not reported below. Opinion of Nelson, J., 16 Wend. 335.

Replevin. Receiptor of Goods to Sheriff.

THE case as stated, was as follows: "The property in question—was levied upon by virtue of a justice's execution, and a third person became the receiptor to the officer, and left the horses with the defendant in the execution to pasture; subsequently, they were levied upon by another officer by virtue of a second justice's judgment and execution, and taken away. The receiptor brought replevin in a Court of Common Pleas, and was non-suited. On writ of error,

The Supreme Court affirmed the judgment of the Common Pleas, holding that the receiptor stood in the relation of surety to the defendant in the execution, and as such was not entitled to sustain the action. On error

The Court of Errors reversed both judgments; holding that replevin may be maintained by a receiptor of goods where he is bound to deliver them by a specific day, or pay the amount of the execution under which the levy was made; although the property be left by him in the possession of the defendant in the execution.

The Chancellor, Walworth, *dissented*, holding "that the plaintiff in the case not having the *actual possession*, could not maintain *replevin*; but conceding that a receiptor has an interest in the property, and may maintain trespass against a wrong doer, who takes it from his actual possession; or case against any one who does an injury to the property."

Judgment *reversed*; 16 to 5.

SALE AND DELIVERY OF GOODS.

MACTIER'S ADM'RS. v. FRITH, 6 Wend. 103-158.

In Chancery, reported 1 Paige, 34, under title of **FRITH v. LAWRENCE**, Administrator of Mactier.

*Sale and Delivery of Goods. Stoppage in Transitu.
Costs.*

H. MACTIER was a commission merchant in N. Y., and died about the 10th of April, 1823. The complainant is a resident at Jacmel, Hayti. He filed a bill in this case against the administrators of Mactier, claiming a certain shipment of brandy, a part of which had been sold by Mactier in his life time, and the residue by the defendant. He also claimed a specific lien upon the proceeds of the sales, and the proceeds of a certain letter of credit and bills drawn in pursuance of it, to pay a balance due to him from the estate of Mactier, which was insolvent. The parties, Frith and Mactier, had agreed in the autumn of 1822, to purchase a cargo of brandy in France, on the credit of Frith, and to be consigned to Mactier at New York, who, on its arrival, was to sell it, and remit the invoice cost to Frith at Jacmel, in provisions. Frith was to sell them, and with the proceeds furnish a shipment of coffee to his correspondent in France, to pay the original cost of the brandy. The profits of the adventures were to be equally shared by the parties. The brandy was imported as agreed upon, and Frith having returned to Jacmel, before its arrival, writes to Mactier on the 24th of December, 1822, sending copies of letters of his correspondents to him on the subject of the "brandy order," and adds: "By the bye, as your brother before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely to your own account, holding the value to cover the transaction to

my account in New York." Mactier answers—expressing his wish that the transaction should go on as proposed, but adds—" *I shall delay coming to any determination, till I again hear from you.* The prospect of a war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France, *in which case I will at once decide to take the adventure to my own account.*" He adds, that the war "*would operate to F's disadvantage.*" The brandy arrived March 12, 1823, at New York, and Mactier entered the brandy at the custom-house as owner, and not as consignee. The clerk of Mactier was permitted to testify, that Mactier told him on the arrival of the brandy, *that he should take it to himself.* Another witness testified to something of the same sort. On the 22d of March, Mactier sold 150 pipes of it. The remainder was put in the public store and bonded. On the 25th of March, Mactier wrote to Frith, advising him of the arrival of the brandy, and says, "In compliance with the wish expressed in yours of the 24th of December, and my answer thereto of 17th January last, *I have decided to take this adventure to my own account,*" and that he has credited him with the amount of the invoice, \$14,254. To this letter was a postscript, dated March 31. On the 28th of March, Frith wrote to Mactier, in which letter he says—"With regard to this adventure, *I would wish to confirm what I mentioned to you some time ago,*" &c. Previous to the arrival of the last letter, Mactier was dead, he having died on the 10th of April, 1823. On the 21st of April, Frith again addressed a letter to Mactier, in which he acknowledges the receipt of Mactier's letter of the 25th March—says he has "*noted its contents,*" and requests Mactier to charter on his account a staunch, first class vessel, and send out to Jacmel by her, 400 barrels of flour, 150 barrels of pork, &c., &c. In the mean time, administration was granted to A. N. Lawrence and another, who, in May, 1823, gave bonds to secure the duties on the 50 pipes, took them from the public store, and sold them at public auction. The complainant, Frith, then filed his bill, claiming the brandy as his own, and that Mactier was only con-

signee, and that Mactier's letter of 25th March was not received till several days after his death, and that his own letter of April 21st, was written in ignorance of it. He avers that the promissory notes received by Mactier from the purchasers were in his possession at his death, and came to the hands of and were collected by defendants; claims the 50 pipes, &c.; prays an account and a decree, directing the defendants to retain the amount of his claim, and to pay to him when Mactier's accounts shall be settled by the court.

The Chancellor held, "that Frith had not consummated the sale to Mactier; and as survivor he was entitled to the nett proceeds of the brandy, so far as they can be traced or identified. The first offer to sell by Frith having been declined by Mactier, his subsequent assent to the proposal did not bind Frith unless he had also assented. The assent of Frith after the death of Mactier, and the fact that he died insolvent, being unknown to him, he was not bound by that acceptance of the offer, and the property was not changed. The Chancellor accordingly decreed, that he had a specific lien on the 50 pipes sold by the administrators, and on the proceeds of the notes remaining uncollected in Mactier's hands at his death.

The Court of Errors *reversed* the Chancellor's decree. Mr. Justice Marcy delivered a long and elaborate opinion in favor of reversal; p. 111,--126. Four senators also delivered opinions, in the main, concurring with the views of Justice Marcy, to wit, *Maynard, Benton, Oliver and Throop*.

1. As to the doctrine of *relation* in regard to the letter of Mactier, accepting Frith's offer, which was not received till after M's death, Marcy J. says, "The doctrine of relation was discussed on the argument, and its application urged upon us. If, as was held in the court below the bargain in this case could not be closed until Frith received M's letter accepting his offer to sell, the receiving that letter, it was said, might be considered as *having relation to the time when it was sent*, upon the principle that courts often resort to this doctrine of relation to prevent an injury resulting to a party from the act of God." "The doctrine of relation may be permitted to operate on these *formal acts*" (such as

enrolment of a deed of bargain and sale, &c.,) but it cannot be used to supply a *party* to a contract, who does not exist at the time when the act is done which fixes to it the seal of validity; or, what is the same thing, it cannot carry back that act to a time when parties capable of contracting did in fact exist. This view of the subject is conformable to the civil law as well as the law of France. *Pothier Traite du Contrat de vente.*"

2. He then considers the question, "Whether there was a contract, before Mactier's death, which had the consent of the contracting parties so given and so made known as to be binding on them? And he maintains that the offer of Frith must be considered as a continuing offer down to the time of Mactier's acceptance." "This doctrine," he says, which presumes the continuance of a willingness to contract after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless storehouse of jurisprudence: it is found in the common law: indeed it exists in case of necessity, wherever the power to contract exists in parties separated from each other. The case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, proceeds upon and affirms the principle." He says, however, "the case of *McCulloch v. The Eagle Insurance Company*, 1 Pick. 278, conflicts in principle according to my views of it, with this case."

"The principle of the decision of the King's Bench is simply that the *acceptance* of an offer made, through the medium of a letter, binds the bargain if the party makes the offer has not revoked it, before it is accepted. The rule laid down by the Supreme Court of Mass. regards the contract as incomplete until the party making the offer is *notified of its acceptance*, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice." He then, after discussing the two cases, lays down the rule in such cases of offers made by letter between distant parties, as follows; "any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubt-

less complete the contract; but a letter written would not be an acceptance so long as it remained in the possession or under the control of the writer." He therefore concludes that "an assent by one party to the offer of the other, does not require a knowledge of that assent by the other party to perfect the contract."

Applying this principle to the facts of the case, he says.

"By a letter dated the 25th, with a postscript of the 31st of March, he accepted the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March, entries were made in his books showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain if the offer can be considered as standing till that day." "In answering Mactier's letter which contained the acceptance of his offer, (Frith's letter of the 21st of April, 1823,) he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale."

After adverting to the objection drawn from the alleged fraudulent conduct of Mactier in suppressing the fact of his having already sold at a profit 150 pipes of the brandy; and declaring that he sees no ground for the presumption of fraud, he says, "My conclusion therefore is that the contract was consummated between the parties before the death of Mactier, by which he acquired all Frith's right to the 200 pipes of brandy."

He then reviews the argument in regard to the right of stoppage *in transitu*, and holds that it cannot apply. "I have seen no case where this right was held to attach on the death of the purchaser, if his estate was solvent. I think the seller could not, in such case, justify an interference with the goods sold while on their transit." "Granting at the same time that he had the right, and that they were to be considered as in their transit while they remained in the custom house at New York, it may be asked what did he do to stay the delivery of them to the administrators of Mactier? Did he forbid the public officer to deliver them? This I believe is not pretended. The administrators took possession of them

in May or June, and sold them as a part of the estate of their intestate, and the first act in relation to them on the part of Frith was in July. They can rightfully hold the avails thereof, unless Frith had rescinded the contract by stopping the brandy before it came to their actual possession. This he did not do, nor did he perform any other act equivalent to it."

"Upon the view of the whole of this case, I entertain the opinion that the decree of the Chancellor ought to be *reversed*."

Chief Justice Savage, and Justices Sutherland and Marcy and 18 senators voted for *reversal*; three senators for affirmance; and after some discussion as to costs, it was decided that appellants should recover their costs, by a vote of 14 to 12.

FURNISS *v.* HONE, 8 Wend. 247, 267.

Not Reported in Chancery.

Sale and Delivery of Goods; Credit; Assignment; Fraud.

THE respondent *Hone*, filed a bill before the Chancellor, against *Furniss and against Duane*, his assignee, to set aside the assignment, as fraudulent against him, and claiming the proceeds of certain goods bought by F. at auction, and assigned by him to Duane for the benefit of creditors. The goods were sold at auction to be paid for in good, approved, endorsed notes; and under a usage or custom between auctioneers and purchasers in the city of New York, the goods were delivered to the buyer after the sale, when he called for them and the auctioneer was afterwards to send for the notes. The notes not having been given, were sent for 7 days after the sale, and the buyer having failed and made an assignment of, the goods the question was whether it was an *absolute delivery*, so as to pass the title or only a *conditional delivery*; so that on the failure to give the notes, the property reverted in the vendor.

The *Chancellor* held it a mere conditional delivery and decreed that Duane, as a general assignee to secure antecedent debts, could not hold the goods against the vendor. On appeal from this decree,

The *Court of Errors* reversed the decree; holding that, even if the delivery were conditional and not absolute, that a delay of *seven* days in sending for the notes, would be considered as a waiver of the condition.

Decree reversed, 18 to 4.

See *Haggerty v. Palmer*, 6 J. C. R. 437.

SET-OFF.

SIMSON, appellant, *v.* HART, respondent, 14 J. R. 63-78.

In Ch. 1 J. C. R. 93-99.

Set-off of Judgments; Jurisdiction of Chancery; Res Judicata.

THE appellant Simson, plaintiff in the Court of Chancery, obtained a judgment in December, 1813, against Hart, the respondent, and one E. Hart, in the Mayor's Court of the city of New York, for \$4,385, for an assault and battery; and the respondent Hart, in a cross suit, afterwards, at the same term, obtained a judgment against the appellant for \$500 for an assault. The appellant then moved the Mayor's Court on affidavits, to stay the proceedings of the respondent on his judgment for \$500, and to set-off the same against so much of his judgment, offering to enter a *remittitur* therefor. The Mayor's Court refused the set-off.

The appellant then filed his bill stating these facts, and that E. Hart, the other defendant was insolvent, &c., and that the respondent was confined within the limits of the jail of the city of New York, and prayed that the set-off might be allowed, and an injunction might issue to restrain

the respondent from proceeding on his judgment. The respondent having put in his answer, stating the application of the appellant to the Mayor's Court for the set-off, which respondent had resisted; the cause came on before the Chancellor, on a motion to dissolve the injunction, which had been granted on filing the bill.

The Chancellor held that the bill could not be sustained, as the matter was already *res judicata* by the decision of the Mayor's Court upon the motion for a set-off; and that the Court of Chancery had no jurisdiction to re-examine their judgment, and he accordingly granted the motion. From this order dissolving the injunction, the plaintiff below appealed to the Court of Errors.

Platt, J., delivered an opinion in favor of affirmance; maintaining that the Chancellor had properly disclaimed jurisdiction in the case, after the decision of the Mayor's Court upon the question of set-off. He also held that the *new fact* relied on, as not stated on the application in that court, viz.; that there were several unsatisfied judgments against E. Hart, the other defendant, docketed before that of the appellant, was one which existed before the motion was made; and that not having chosen to avail himself of it then, it could leave no claim to the interposition of the Court of Chancery. Van Ness, J., concurred in those views.

Spencer, J., delivered the opposite and prevailing opinion in the cause. He said:

"There are two points for the consideration of the court:

1. Was the appellant entitled to the relief prayed for in his bill, independently of his application to the Mayor's Court of New York, and if that application had not been made?

2. Is the decision of the Mayor's Court such a determination as precludes a court of equity from entertaining the question and affording the relief sought for.

"The Chancellor, in assigning his reasons for dismissing the appellant's bill, has not discussed the first question, nor was it necessary for him to do so. Holding a different opinion on the *second* point, it is necessary for me to consider both.

"I have no hesitation in saying that Chancery had origi-

nal and rightful jurisdiction of the suit ; and was fully authorized, by a series of adjudged cases, in issuing a perpetual injunction against the respondents' suing out execution on his judgment, on appellants entering satisfaction *pro tanto* ; or which would have produced the same result, decreeing that the respondent should acknowledge satisfaction of his judgment upon the like terms.

"There is no force in the objection that the judgments are not in the same right ; it is well settled that although the demands as being joint and several, are not strictly speaking due in the same right, yet if the legal or equitable liabilities or claims of money become vested in or may be urged against one, they may be set off against separate demands, and *vice versa* ; (Bull. N. P. 336 ; 2 H. Bl. 587 ; 4 T. R. 123,) and in some of the cases, this was done without any pretence of insolvency in either of the parties.

"The objection is equally untenable that the judgment of the appellant being for a *tort*, the respondent's judgment ought not to be set off and deducted therefrom, because there is no contribution among trespassers. The respondent owes the whole judgment, and the appellant might, if he saw fit, enforce it against him alone."

"I am not aware that thus far, I have advanced any opinion in opposition to that of the Chancellor ; but I am under the necessity of differing from him as to the remaining point. I can not assent to the opinion that the decision on the motion in the Mayor's Court, ousted the jurisdiction of a court of equity, upon the principle that it was *res judicata* ; or on the ground of comity.

"Upon authority, it seems to me that the decision of the Mayor's Court was not decisive of the question. 7 Ves. jr. 14, 15 ; 5 id. 108 ; Rep. Temp. Finch, 472. Were it necessary, to uphold the jurisdiction of the Court of Chancery, in this case, the new fact, stated substantially in the bill, that E. Hart was also insolvent, would seem to put that question beyond doubt ; for certainly the decision on the summary application, ought to have no greater effect in ousting the Court of Chancery of its jurisdiction, than it would have upon the court which made the decision ; and it appears to me that even that court, on another application, by bringing be-

fore it, that additional fact, might and ought to entertain the question a second time.

I perfectly subscribe to the proposition, that the judgment of a court of competent jurisdiction, upon a matter within its cognizance, is final and conclusive, unless appealed from, and reversed or vacated. But this rule does not in my apprehension embrace this case, because it has no quality of a judgment.

"I do not therefore differ from his honor the Chancellor in his principles. I dissent only in the application of acknowledged principles to this particular case. My opinion is, that the appeal decreed from ought to be reversed."

Thompson, Ch. J., and Yates, J., were of the same opinion. Order of the Chancellor *reversed*, with costs to be taxed, and "proceedings remitted to the end that the set-off in the pleadings in the cause may be allowed," &c.

For reversal 21, for affirmance 8.

DRIGGS v. ROCKWELL, 11 Wend. 504.

Not reported in S. Ct.

Set-Off ; Pleading.

THIS was an action against the plaintiff in error, as the maker of a promissory note, negotiable, which had been assigned after its maturity. The defendant below, on the trial of the cause, offered to show a set-off to the amount of the plaintiff's demand on the note, of a demand due to the defendant, *from the assignor*, existing at the time of the transfer. The evidence being rejected, a verdict was taken on the *second* count, the plaintiff having abandoned the first count which was covered by a special plea; and assessed only contingent damages.

The Supreme Court confirmed the verdict; and held that such a set-off could not be made as the law stood before the revised statutes. On writ of error,

The Court of Errors held, that a set-off to the amount of the plaintiff's debt might be made of a demand existing

against the assignor, provided it be such as might have been set off against him, while he owned the note; or if the suit be in the name of a plaintiff who has no *real interest* in the note, so much of a demand existing against the real plaintiff, or for *whose benefit the suit is brought*, may be set off as will satisfy the plaintiff's debt; and such right of set off existed as well *before* the revision of 1830, as since.

2. Where a declaration contains two counts for the same cause of action, and the defendant pleads the general issue to both counts, and a special plea in bar to the first count, and the plaintiff on the trial proves only one cause of action, which is covered by the first count and the special plea in bar, he cannot abandon the first count and resort to the second, which is not covered by the special plea, so as to avoid the effect of that plea; but to avail himself of this rule, the defendant must take the objection at the trial, and will not be allowed to rely upon it on a writ of error, unless presented by a bill of exceptions.

The plaintiff had demurred to the special plea, and there was a joinder in demurrer; but the plaintiff proceeded to trial on a general *venire*, and not a *venire tam quam, &c.*, and therefore, though a new point of form and amendable, contingent damages could not be assessed.

Judgment reversed; 17 to 3.

DOWNER v. EGGLESTON, 15 Wend. 51.

Not reported in S. Ct.

Set-Off.

IN this case, the Court of Errors held, that a *bond debt* may be set off against any demand recoverable under the *money counts*; or for which an *indebitatus assumpsit* will lie. The Supreme Court had decided against the set-off.

The Court of Errors also held, that a plaintiff cannot by declaring *specialty* where he may recover his demand under a general count, deprive the defendant of his set-off.

The court also held, that a defendant has a right to insist

upon a set-off, although he has positively agreed to account for or pay over to the plaintiff, moneys which the plaintiff authorized him to receive as his *agent*.

Judgment of the Supreme Court, denying the set-off, *reversed*.

SHERIFF.

LYON & BROCKWAY v. RICHMOND, TALLMADGE and others,
14 J. R. 501.

In Chancery, 2 J. C. R. 51.

Sheriff ; Chancery Jurisdiction ; Pleading ; Practice.

BILL by Lyon & Brockway to set aside an assignment and release.

Tallmadge and others, plaintiffs in a suit against Richmond, a sheriff, (see 9 J. R. 85,) obtained a judgment against him for an escape by B. from the liberties of the gaol. R. then obtained a judgment against L. and E. the sureties of B. for the liberties. Whereupon L., one of the sureties, prosecuted a writ of error in the name of the sheriff to reverse the judgment against him: during the pendency of the writ of error, the sheriff assigned the judgment he had obtained against the sureties to T. and others, the plaintiffs in the first suit. The assent of L. was procured to the assignment by threats of selling his real estate, and representations calculated to alarm his fears. After the assignment of the judgment against the sureties, the sheriff was prevailed upon to execute a release of errors in the judgment against himself, so as to defeat the writ of error L. was prosecuting. The surety, L., then filed a bill in Chancery to set aside the assignment and release; and to be permitted to prosecute his writ of error in the name of the sheriff, the Court of Errors in the mean time, having decided in another

case, that the sheriff was not originally liable for such an escape as that for which that suit was brought.*

The defendants answered the bill, and upon the hearing,

The Chancellor, (Kent,) held, that the complainant was not entitled to relief in Chancery under these circumstances—that where parties have made agreements and arrangements with a full knowledge of the facts of their case, Chancery does not undertake to relieve them from their acts and deeds fairly and deliberately done, though under a mistake or ignorance of the law. That, therefore, the subsequent decision of the highest court, giving a different exposition of a point of law from that declared and known to the parties at the time the arrangement took place between them, could have no effect upon the settlement made by them, but that it remained entirely valid. The bill was accordingly *dismissed with costs*. But on appeal from this decree,

The Court of Errors *reversed* it, upon the grounds, 1. That the assent of the complainant, the surety, was obtained by taking undue advantage of his situation and necessities, and therefore it was no obstacle to the relief sought: 2. That, admitting his assent to have been duly obtained, yet, as it did not appear that he assented to the release of errors, the assignment could not affect his right to bring a writ of error, nor was his right affected by the release; for the sureties to a sheriff have a perfect right to use his name in prosecuting a writ of error, a recovery against the sheriff being in effect a recovery against them. 3. The court held, that where an unconscientious advantage has been taken of the situation of a party, although the circumstances do not amount to fraud, in contemplation of law, yet a court of Chancery may relieve.

It was also held, that the plea in bar of a former decree upon the same matters, (see 1 J. C. R. 184, *Lyon v. Tallmadge*,) must state so much of the bill and answer as to show that the same point was in issue in the former suit; and it seems to be also held, that even if it had related to

* See under title of "Escape," the cases of *Jansen and Hilton*, and *Barry v. Mandell*, 10 J. R. 519; id. 563.

the same and not, as it was held, to a distinct and independent matter—yet, that to be a complete defence as a bar, it must be pleaded or relied on in the answer as a bar; it is not enough to produce and read it at the hearing.

The court also held in this case, that where two defendants answer separately to a bill, and one refers to and adopts the answer of the other as his own, and a replication is filed to the answer of the latter, but not to that referring to and adopting it, and proofs are taken in the cause, that this is not an admission of the truth of the answer of the party adopting the answer of his co-defendant.

In this case Spencer, J., delivering the opinion of the court, says also: "This court is bound to decide upon the justice and law of the case, and not merely upon the points raised by counsel."

Decree *reversed* accordingly.

SHIPS AND FREIGHT.

MUMFORD *v.* NICOLL, 20 J. R. 611.

In Chancery, 4 J. Ch. R. 522.

Joint Owners of Ship; Lien of, as between each other.

THE point on which the decree of the Chancellor was reversed was as to the principle adopted by him, that the part owners of a ship stand on the footing ("nice distinction" the reporter calls it,) of *tenants in common*, and not as partners; and that therefore one owner having got into his possession or received the whole proceeds of a voyage, he has *no right* to retain them against his joint owner to reimburse or indemnify himself for what he has paid or advanced more than his share for the outfits, repairs, or expenses of the ship for that particular voyage or adventure;

But the Court of Errors *reversed* this part of the Chancellor's decree holding that though the part owners are, gene-

rally speaking, *tenants in common*, not partners or joint tenants; yet there may be a *special partnership* between them in the ship, as well as in the cargo, in regard to a particular voyage and adventure, and the proceeds arising from the sale of the ship and cargo and the profits of the adventure; and where one of two part owners of a ship and cargo receives or gets into his possession the whole proceeds, *he has a right to retain* them until he is paid or indemnified for what he has paid or advanced more than his share; but not for any *general* balance of account arising from former and distinct voyages or adventures in which they have been concerned together, in the same or other ships or vessels, there being no general partnership between them, and each adventure creating a special partnership by itself, which terminated with the particular adventure.

Chancellor Kent, in this case, followed the decision of Lord Eldon, in *Ex parte Young*, 2 Ves. & Beames, 242. Lord Eldon held, that a part owner of a vessel had no lien on the share of his co-owner for a balance which may be due him.

In 1 Gilpin, 460, *Hopkinson*, *District Judge*, says, "I should be disposed to follow the opinion of Lord Eldon in the case of *Ex parte Young*, 2 Ves. & Beames, 242, as Chancellor Kent did, on this question in the case of *Mumford v. Nicoll*; although a majority of the judges in the Court of Errors, seemed inclined to support the opinion of Lord Hardwicke in the case of *Doddington v. Hallett*, 1 Ves. Sen. 497, which was in favor of the lien."

Per Hopkinson, J. in *Patton v. The Randolph*, 1 Gilpin, 460.

In *Doddington v. Hallett*, Lord Hardwicke held that part owners of a ship, being tenants in common and not joint tenants have a right notwithstanding to consider that as a chattel used in partnership and liable as partnership effects to pay all debts whatever to which any of them are liable on account of the ship."

Though *Ex parte Young* and *Daniel v. Russell*, 14 Ves. 393, seem to decide the contrary, and a case in Massachu-

settles Supreme Court, *Merrill v. Bartlett*, 6 Pick. 47, might on mere authority balance that of Lord Hardwicke, yet the case of *Mumford v. Nicoll*, as decided by our Court of Errors seems to have settled the law on this point, in our own state, as to the lien of a part owner for the balance due him for his advances beyond his own proportion or account of the ship, where the lien is claimed on a *particular voyage* as in that case; and the expression of Hopkinson, J. that a majority of the judges of the Court of Appeals (Errors) seemed *inclined* to support the opinion of Lord Hardwicke, in the case of *Doddington v. Hallett*, refers only to that part of Lord Hardwicke's decision which gave a lien for a general balance on the voyages and transactions of the ship-owners, in favor of the creditor owner. But as to the lien on the *particular voyage* in that case, the Court of Errors distinctly overruled and *reversed* the decree of the Chancellor and sustained the lien.

From the opinion of Spencer, Ch. J. upon those two points the following extracts will prove that he was inclined to adopt the rule of Lord Hardwicke in *Doddington v. Hallett*, to its fullest extent, as to the lien of a part owner for advances where there was, as in that case, a limited special partnership existing in the fitting out, on a circuitous trading voyage at the joint expense of the parties. He says, "Lord Hardwicke perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint tenancy, as between partners, of the goods and stock in trade. He meant to decide and did decide that a subject which ordinarily may be held as a tenancy in common may by the acts of the parties, become to be held in joint tenancy. And the facts of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit her out and victual her for the service of the East India Company, formed in his judgment such a community of interest, as to constitute that a partnership transaction, in relation to those subjects, and thus a specific lien was acquired by those who contributed more than their shares, against the shares of the one who contributed less than his proportion.

"The cases cited by the Chancellor, and on which he has

relied to establish a contrary doctrine do undoubtedly strongly impugn the authority of *Doddington v. Hallett*, though I must be allowed to say, that the case, *Ex parte Parry*, 5 Ves. Jr. 575, is very distinguishable and does not oppose Lord Hardwicke's opinion."

"It is, however, to be observed that all the cases on which the decree (in the case before the court) is founded are long since our revolution, and have no authoritative influence here; and I am not disposed to overrule Lord *Hardwicke*, supported, as I think he is, by Lord Mansfield and the other judges who sat with him, in a case in which justice and right require him to be supported. The statement of this case shows, that it is much stronger for the appellant than the case before Lord Hardwicke. The vessel here was owned in equal shares and was fitted out, or to be fitted out on a circuitous trading voyage at the joint expense of the parties. It was, therefore, a limited and special partnership, not only as to the cargo, freight, and the profits thereon, but as to the fitting out of the vessel. The respondents are assignees for prior debts and are chargeable with notice, or at all events, have received the subject, liable to all equities between the appellant and Stillwell. Can it be just and equitable to deprive the appellant of his right to re-imburse himself for the moneys he has been compelled to pay, as part owner for the default of Stillwell, in whose shoes the respondents stand? I answer unhesitatingly, that it would be inequitable and unjust to do so."

November 13th, 1822. A majority of the senators (24 to 4,) concurred in the opinion of Ch. J. Spencer, that the decree ought to be *reversed* in part and thus modified: it was accordingly *decreed*, that the decree of the Court of Chancery be *reversed*; and that an account should be taken between the respondents as assignees of Stillwell, and the appellant, in respect to the brig Phoenix and her cargo and voyages, &c., on the footing of a special partnership in such brig, cargo, and voyage, and the proceeds thereof: and that on such accounting, the appellant should be allowed all moneys paid by him more than his proportion for repairs to the Phoenix, in

fitting her out for the voyage, and also for what he had paid more than his proportion of her outfit in ship chandlery or otherwise, excluding from such accounts any former or other voyage in any other vessel or vessels."

Question of costs reserved.

P. and G. LORILLARD v. PALMER and others, 16 J. R. 348.

PALMER v. LORILLARD, 15 J. R. 14.

Ships and Freight ; Blockade.

THIS was an action of assumpsit for the non delivery of a quantity of tobacco, shipped on board a schooner lying in the port of Richmond, Va., in January, 1813, by the plaintiff's agent. About the 27th of the same month, the vessel sailed for New York, and on the 2d of February, the master came to anchor in Hampton Roads, for the purpose of ascertaining whether he could safely proceed to sea; there being at that time a British squadron blockading the Chesapeake, through which the vessel must necessarily pass. When he had ascertained the impossibility of getting to sea without being captured, and the danger of remaining in Hampton Roads, by the advice of Captain Stewart of the U. S. navy, commanding at that station, he put into Norfolk and there remained until about the 7th of March, when on account of the increase of the British squadron, it was deemed unsafe to remain at Norfolk, and he returned with the vessel to Richmond, where she arrived on the 15th of that month. She continued there until the 21st of September, when in consequence of a violent storm and freshet in the river, she was sunk at the wharf, without any fault or negligence of the defendants or their agents, and the tobacco in question was wholly spoiled and ruined. At the time the bill of lading was signed, it was not known at Richmond that the Chesapeake was blockaded, nor was it known by the master or the defendant; and in fact the blockade did not then exist; but it continued without intermission, from the time the vessel attempted to sail on her voyage, until after she was lost. On

the 16th of September, after her return to Richmond, the agent of the plaintiffs demanded the tobacco of the master for the purpose of forwarding it to New York by land, and he refused to deliver it, unless on being paid half-freight. Verdict for the plaintiffs for the invoice price of the tobacco, with interest, subject to the opinion of the court; on the motion for a new trial, Thompson, Ch. J., delivered the opinion of the court. He said :

"The only question in the case is, whether the master was bound to comply with the demand, without receiving the half freight claimed.

"I know of no principle of law on which half freight could be claimed. The defendant had a right to demand full freight or none at all. But I think no freight could be claimed. Although the right to freight commences on the loading of the goods, it is a defeasible right, depending on the success of the voyage; and in case no part of the *iter* is performed to any beneficial purpose, no freight is earned. (3 J. C. 97.) If the ship owner is determined to have his freight, he must forward the goods. It is upon the delivery of the cargo that the right to freight depends, unless such delivery is waived, and some new contract is made respecting it. If the ship owner will not or can not carry on the cargo, the freighter is entitled to receive his goods again without paying any freight. (*Hunter v. Prinsep*, 10 East. 393.) "It is well settled that by the blockade of the port of discharge, a charter party is dissolved, and all claim to freight under it gone. (*Scott v. Libby and others*, 2 J. R. 336.) "The effect of the blockade upon the bill of lading is very much the same as upon a charter party. "If an action of trover could have been sustained for the tobacco without paying the freight, it must follow as a matter of course that the defendants are responsible for the loss; because they were in default in not delivering the tobacco when demanded." Judgment for plaintiff. On writ of error brought,

The Court of Errors held that the contract of affreightment was not dissolved by the hostile blockade of the port of departure; the performance of it is merely suspended; and the ship owner or master may detain the goods, until he

can prosecute his voyage with safety, or the freighter may demand his goods on tendering the freight.

The court held further that it is only when the voyage is broken up on the part of the ship owner or master, or the completion of it becomes unlawful, that the contract is dissolved.

But the court also held, that as the special verdict found "that the vessel was sunk and the cargo lost, and without any default of the defendants or their agents, the goods were wholly spoiled and lost," that if the plaintiffs had a cause of action they could not recover in that form of action, as the jury, by their special verdict had negatived the *gravamen* alleged, to wit, the negligence of the defendants; and that the Court of Errors could not look to any other facts, than those found by the jury. But the plaintiffs had no cause of action, since the contract was not dissolved, and the defendant had a right to retain the goods until he could proceed on his voyage, or the plaintiffs tendered the freight or the contract was rescinded by mutual agreement.

See as to *S. P. Ogden v. Barker*, 18 J. R. 87, where Spencer, Ch. J., says "The leading facts in this case are so entirely like those in *Palmer v. Lorillard*, that there is no distinguishing the two cases. To that decision we are bound to submit."

In *Stoughton v. Rappalo*, 3 Serg. and Rawle, 559, this question as to the effect of a blockade in dissolving a contract of charter party is raised. Tilghman, Chief Justice says it is a difficult question, but that it was not necessary to decide it in that case, and the court gave no opinion upon it.

✂ In the case of *Palmer v. Lorillard*, on the question as to the form of action; that it should have been trover and not assumpsit, so as to sustain a judgment on the facts found by special verdict, Chancellor Kent, who delivered the opinion of the court says: "How this point came to be omitted in the Supreme Court, I do not know. The question before us arises upon the special verdict in which we can not avoid comparing the verdict with the declaration. Nor do I think that this case comes within the rule that an objection not

taken in the court below, can not be taken here. That rule was only intended to be applied to objections that the party may be deemed by his silence to have waived, and which when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed, we can not, without shocking the common sense of justice, allow the recovery to stand."

The judgment was unanimously *reversed*.

The reporter adds this note: "Though the whole court were for the reversal, yet a few of the members confined their opinion to the first point; (as to the finding of *no negligence* by the special verdict;) A great majority however concurred with the Chancellor generally, that the judgment ought to be reversed on both points."

VAN BOKKELIN *v.* INGERSÖLL, 5 Wend. 315.

In S. Ct. 7 Cow. 670.

Shipping; Freight; Master and Owner; Lien.

THIS was an action of trover brought by the master of a ship engaged in foreign trade, against a party to whom he had delivered goods for safe-keeping, upon the freight for which he claimed a lien for the amount of advances and liabilities on account of the ship on the voyage then just terminated. The bailee without the master's permission, delivered the goods by direction of the owner to the consignee, on his paying the freight to *the owner*. The relation between the owner and master of a ship as to the liabilities of each on account of supplies and advances on her account, and the lien of the master for his freight were considered by the Supreme Court, and it will be seen that their decision was held correct by the Court of Errors as to the following points decided by them.

1. That a master of a vessel may collect the freight; but this is a right not for his own benefit, but as agent of the owner. The master has therefore no lien on the cargo, as against the owner, by which to secure an exclusive or gene-

ral right to receive the freight as master ; but a payment of freight to the owner will discharge the goods, and is a complete defence against the master in an action for freight against the *consignee*.

2. That both owner and master are liable for all supplies and advances made for the use of the vessel on the contract of the master, unless credit is given to either exclusively, and that this extends as well to supplies furnished by a consignee of the vessel as to others.

3. That the master has a lien on the cargo and freight, co-extensive with his advances or liabilities for the use of the ship, and actual advances are not necessary to create the lien. Mere liability without payment is sufficient.

4. That the ship having earned freight on a voyage directed by a pretended owner, but who in fact had no title to her, and was a *tortfeasor*, in getting possession of her, and from whom she was taken, and the possession restored to the true owner, by the decree of a court of admiralty ; yet the true owner, especially if he receive the freight, is bound to indemnify the master against the liability incurred by him on account of the vessel ; and the master has a lien on the cargo and freight, which he may retain or control to coerce the payment to him of the amount of his advances, liabilities, and primeage. That the bailee of a part of the cargo subject to such lien, which was placed in store with him by the master to keep for *him*, having delivered it to the consignee on his paying the freight to the owner, was liable to the master in trover for the amount of his lien ; and such a delivery of goods by a bailee for safe keeping, does not destroy the lien of the bailor ; and that the right of lien in goods, is such a special property in them, as will support an action of trover, although the act of delivery or conversion is done under the authority of the general owner.

5. The Supreme Court also held that a person to whom the master was liable for advances on account of the ship, was a competent witness for the master in a suit to enforce his lien. The objection goes only to his credibility.

These conclusions of the Supreme Court, (see 7 Cow. 670. *et seq.*) were not disturbed by the Court of Errors, but expressly affirmed. The reversal was on a point to which

apparently the attention of the Supreme Court was not particularly called. The jury had found a special verdict in the case, and among the items which they allowed the master in the amount of his lien, if the court should find him entitled, on the facts presented by, to a recovery, was an item for \$140 wages due the master. The judgment rendered in the Supreme Court, included this item, and this was the only ground on which

The Court of Errors reversed the judgment. On the question being put, it appeared that the members of the court were unanimously of opinion that the judgment of the Supreme Court was erroneous, in allowing the master to recover for his *wages*, but that for the *residue* the judgment was right.

Whereupon a question arose whether the judgment of the Supreme Court could be *affirmed* in part, and *reversed* in part, and at a subsequent day,

The Chancellor stated the rule to be that when *distinct* judgments are given by the court below, as for instance a judgment for damages, and a judgment for costs; one may be reversed and the other affirmed; but when the judgment is *entire*, there must be a total affirmance or reversal. 8 J. R. 111, 558; 12 id. 340, 434; 13 id. 460; 14 id. 417. In the special verdict in this case, the jury have stated the several amounts of the several items, but yet if the Supreme Court should be of opinion that the plaintiff was entitled to recover, they assessed the damages at a gross sum, and for that sum the court had given judgment. The judgment, therefore, as to the damages, was *entire*, and there must be a *total reversal*, with directions to the Supreme Court to award a *venire de novo*, so that the jury on the second trial might be instructed not to allow for the master's wages in the verdict that they should pronounce.

It was thereupon allowed that the judgment of the Supreme Court must be reversed in *toto* with costs; whereupon a decree was entered to that effect *by consent of parties*, the following addition being made thereto. "That a *venire de novo* be awarded by the Supreme Court, unless the defendant in error remit \$140 (amount of the master's wages)

with interest, &c., and if he do so, that the Supreme Court give judgment for the residue of the damages included in the verdict, with costs in the Supreme Court."

STATUTE OF FRAUDS.

PARKHURST, appellant, v. VAN CORTLAND, respondent, 14
J. R. 15.

In Ch. 1 J. C. R. 273.

Parol Contract for Sale of Lands ; Specific Performance where Improvements were made, or Compensation for Improvements ; Parol Evidence to supply Defect of Written Agreement.

THE appellants filed their bill against the respondent for a specific performance of a contract to sell or lease in fee, a tract of wild land to them, when his title should be perfected by a partition of the premises. The appellants had entered upon the land under an assignment of a license given by the respondent, to occupy and improve the lands ; they afterward surrendered the license to the respondent, and took a written memorandum, authorizing them to possess the land, and promising them the preference to purchase or lease it. It was proved that the respondent had, at various times, encouraged the appellants to build and make improvements on the land, by assurances that no advantage should be taken of their labor, and that when his title was perfected, they should have a lease in fee or a deed, at the rate at which wild lands were selling. After his title was perfected, the respondent refused to convey, and brought ejectment against the vendees.

The Chancellor, Kent, held that the agreement as set forth in the written memorandum referred to, and as it appeared from the parol evidence in the cause, were not, even with the alleged part performance by improvements, sufficient to take the case out of the statute of frauds, so far as regarded

a decree for specific performance ; that the written memorandum was uncertain and defective, and did not give the parties mutual remedies ; and that as one party only was bound by it, a specific performance would not be decreed. But he held also, that the bill might be retained for the purpose of affording the party a reasonable compensation for the beneficial and lasting improvements he may have made upon the land ; and made a decree accordingly. On appeal from this decree,

The Court of Errors reversed the decision ; the court holding, that the appellants having gone on the land, and under the written memorandum, made improvements, that was a sufficient part performance of the agreement to take it out of the statute ; and that, although the memorandum of the agreement was uncertain in its terms, yet, as a part performance was made the basis of the claim to a specific performance of it, parol evidence might be connected with the memorandum in writing, for the purpose of making out the contract ; and there being satisfactory evidence of an agreement, independently of the memorandum, the conduct of the respondent was held to be unfair, and such a fraud on the appellants, as to justify a decree for a specific performance.

✎ The general principle in regard to a memorandum in writing for the sale of lands, as recognized by the Chancellor in this case ; " that to be valid, it must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof," is not questioned in or impaired by this decision of the Court of Errors, decreeing the specific performance. The court held that the only use of the memorandum in the case, was to show that the appellants took possession with the consent of the respondent, and were not intruders.

DAVIS and BROOKS v. SHIELDS, 26 Wend. 341 to 366.

In S. Ct. 24 Wend. 324.

Statute of Frauds; Sale of Goods and Chattels; Memorandum of Contract.

THE defendant in error brought an action of assumpsit in the Superior Court of the city of New York, for the non-delivery of fifty tons of iron, purchased by him of the plaintiffs in error. The purchase was made January 21st, 1826, of a broker of the defendant, who made the following memorandum of the contract of sale in a book kept by him for that purpose. "January 21st. Sold this day to George W. Shields, on account of Davis and Brooks fifty tons of English bar iron—say 25 tons, one and three-quarters by one and a half; 25 tons, one and three-quarters by five-eighths; 50 tons at \$70 to arrive on board brig Anna; said iron to be in good order, or no sale." The broker communicated the sale to the defendants, but no sale note was delivered to the parties. The iron was shipped on board the brig Anna, and the invoice and bill of lading dated the 30th of Oct., 1835, were received by D. and B. December 4, but the brig did not arrive until the middle of April, 1836, when the price of iron had advanced to \$98 per ton. On the 27th of April, the defendant in error tendered a note for \$3,500 at 6 months for the iron, according to the terms of payment agreed upon between the broker and himself; which D. and B. declined to receive. He then tendered the cash, and demanded the iron, but the plaintiffs in error refused to receive either, or to deliver the iron. The usual passage of ships carrying iron was proved to be from 30 to 70 days.

On the trial of the cause, it was insisted for the defendants that the memorandum of the broker was not a sufficient note of the contract within the statute of frauds, as it did not contain the agreement as to the time of payment, nor that of arrival in reasonable time, and was not subscribed. The Chief Justice of the Superior Court, charged the jury that the memorandum was sufficient, and that the plaintiff

was entitled to recover. Verdict for plaintiff. Charge excepted to by defendants, and on error brought,

The Supreme Court affirmed the judgment of the Superior Court, (see 24 Wend. 324.) But on error to this court,

The Court of Errors held that the memorandum was not sufficient within the statute, as it was not "*subscribed* by the party to be charged thereby;" the name of the party not *being signed* below, or at the end of the memorandum, and that the mere mention of the names of the parties sought to be charged, in the body of the memorandum, though good enough before the Rev. Stat. was not since then sufficient to bind the parties.

It was further held, that as the entry in his sale book *varied* from the contract actually made, neither party was bound, as no note or memorandum of the contract could be said to be reduced to writing; and this although the stipulation for six months credit, and for the arrival of the iron in *reasonable time*, were for the benefit of the purchaser, and he elected to waive them on its arrival.

It was also held that to render a contract valid under the statute, it is enough if the note or memorandum be subscribed by the party sought to be charged thereby, or by his authorized agent; and that it is not necessary that both parties to an agreement, should subscribe their names.

The Chancellor and Senator Verplanck, delivered opinions to the foregoing effect, and the judgment was *reversed* by a vote of all the members of the court present at the argument, except Senator Paige, who voted for affirmance.

STATUTE OF LIMITATIONS.

MILLER v. SMITH's Executors, 16 Wend. 425.

In S. Ct. 14 Wend. 190.

Presumption of Payment of Judgment after Twenty Years.

A CASE was agreed upon by the parties to this suit, in the Supreme Court; stating that the judgment on which an action of debt was brought in 1833, was rendered against the defendant Miller, in that court in August, 1805; that he had at all times been possessed of property within this state, and was at all times able to pay the said judgment. The defendant insists that it has been paid, and relies on the presumption arising from lapse of time as evidence of payment, until something be shown on the part of the plaintiff to repel the presumption. The plaintiff denies that the doctrine of presumption is applicable to a judgment.

The Supreme Court held, that at *common law*, *presumption of payment* does not attach to a judgment, although there be no evidence of partial payments or of acknowledgments of indebtedness within twenty years. They also held, that the presumption of payment which by statute of 1821, attaches to judgments after twenty years, introduced a new principle into the law of this state; that previously, such presumption applied only to *sealed instruments*; that this case was not within the statute of 1821, as the presumption will not attach to judgments rendered anterior to that act, until twenty years from its passage. That the provision of the R. S. (2 R. S. 301, § 46,) is but a *revision* of that of 1821, and does not go behind it in its operation and was not intended to be retrospective. Judgment for plaintiff. The defendant brought error.

In the Court of Errors, the case was presented to the court as it stood upon the trial of the case, and some additional facts were contained in the bill of exceptions; the

defendant having offered to prove that on the day of the docketing of the judgment, an execution issued thereon to the sheriff of the county of Onondaga, where he then resided; that the sheriff was dead, his family removed, and that the execution had not been returned by the sheriff, which evidence being objected to, the judge rejected, and the defendant's counsel excepted.

The Court of Errors held, that at common law, the presumption of payment, after a lapse of twenty years, applies as well to judgments as to bonds, mortgages, and other specialties.

In action of debt, on judgment brought after a great lapse of time subsequent to the entry of judgment, it was held that in support of a plea of *payment*, it is admissible to show that an execution was issued upon the judgment, shortly after its entry, that the defendant was at the time owner and possessor of property amply sufficient to pay the debt. That the plaintiff directed the officer to proceed without delay; that the officer has been dead for many years, and that the execution had not been returned to the proper office; *And further*, that such facts unexplained, and not rebutted by evidence on the part of the plaintiffs would warrant a jury to find in favor of the defendant, and because such evidence was *rejected*, a new trial was granted.

Judgment of Supreme Court *reversed* by vote of 22 to 2, and *venire de novo* awarded.

See opinions of Chancellor and of Senator Maison, and note of reporter, 16 Wend. 425, 426.

STREETS AND HIGHWAYS.

THE PEOPLE *ex rel.* HOYT v. THE SUPERVISORS OF KINGS COUNTY, 16 Wend. 520.

Authority of Supervisors to review Assessment of Damages by a Jury on laying out Highways in Suffolk, Queens, and Kings Counties. Mandamus.

IN error. A jury having been called to assess damages on the laying out of a highway in Kings county, and having assessed the relator's damages at \$1,450, the board of supervisors was required to lay a tax upon the town of Brooklyn according to the requirements of the "act regulating highways and bridges in the counties of Suffolk, Queens, and Kings," passed 23d February, 1930. The board having declined to do so, and proceeded to review the verdict of the jury, an alternative mandamus was issued directing them to impose a tax to satisfy the relator's damages, or to show cause, &c. Upon a return to the writ setting forth the above facts, and relying for their course on the case of *The People ex rel. Patchin v. The same Defendants*, 7 Wend. 530, and on demurrer to the return; the Supreme Court gave judgment for the defendants upon the principles, and for the reasons given in that case. On writ of error,

The Court of Errors *reversed* the judgment; holding that the supervisors in those counties, under the act in question, had no power to examine into the principles on which the jury proceeded in making their assessment, or into its fairness or justice. The Chancellor was of opinion that the *general act* in relation to *highways* which gives the supervisors power to "examine into the principles on which such assessments are made and to increase or reduce the damages as in their judgment should be just and reasonable," (1 R. S. 515, § 69,) did not apply to those counties, and that the difference in the phraseology of the two acts was designed with the express view to continue their local law as it existed at and

before the passage of the act of 23d February, 1830, so that the verdict of the jury should be final and conclusive, as well in respect to the *town*, as the *individual* whose land was taken; and that the supervisors were bound to allow the whole amount, and to levy a tax accordingly.

All the members of the court, with one exception, 25 being present, voted to *reverse* the judgment.

§ The case of *The People ex rel. George M. Patchen v. The Supervisors of Kings County*, referred to above, was a case where the commissioners of highways of the town of Brooklyn, had also caused the damages of the owners of lands taken for a highway, to be assessed by a jury. The supervisors returned to the alternative mandamus, that the road was not required for the town of Brooklyn; that two of the commissioners were interested in the laying out of the road, and that the damages were exorbitantly high, &c. On the motion for a peremptory mandamus,

The Supreme Court held, that the supervisors were not concluded by the assessment of a jury or the liquidation of the commissioners, but might *reduce* the amount certified, and direct the balance only to be collected.

The court further held that the supervisors have no authority to inquire into the regularity of the proceedings of the commissioners, which can only be reviewed upon *certiorari*.

This decision of the Supreme Court is therefore, as to the question of reviewing and reducing the assessment, entirely *reversed* by the above case in the Court of Errors.

MURRAY v. GRAHAM and others, 22 Wend. 559.

In Ch. 6 Paige, 622.

Assessment for opening Streets, where Vendor has bounded the Lots sold on one of the Public Streets not yet opened ; Jurisdiction of Chancery to relieve against improper Assessments, where Party did not oppose Confirmation.

THE bill in this case was filed by the complainant to be relieved from an assessment upon his property for the expense of opening Twelfth Street in the city of New York. The defendant Graham was formerly the owner of the lots, and in the deeds conveying them to the complainant Murray, reference was made to that street, not yet opened, and the lots described in the deeds as fronting on it. The corporation of New York, who were also defendants to the bill, proceeded shortly after the purchase to open the street ; and the commissioners allowed to Graham's trustee, the full value of the land taken for it, and the amount thus allowed to Graham, was assessed against Murray, as a benefit accruing to his lots by the improvement. The complainant objected before the commissioners, but suffered the report to be confirmed by the Supreme Court without appearing to oppose. The amount of the assessment was then paid to Graham's trustee. The cause came before

The Vice Chancellor of the first circuit, who decreed that the legal title to the land covered by the street, was held by Graham subject to the right of the complainant to have it opened and kept open as a public street ; and that his damages for taking the land were merely nominal ; and he ordered a reference to ascertain what part of them were allowed to Graham's trustee for the land in front of the lots of complainant, and how much was assessed upon them ; reserving all other questions, &c.

From this decree the defendant Graham appealed to the Chancellor, who held as follows :

1. The purchaser's lots being bounded upon one of the

public streets in the city of New York, as laid down upon the commissioners' map and plan of the city, he was not liable to be assessed for the purpose of compensating the vendor for the land taken for the street. But he must insist upon his right of exemption before the commissioners, and if they decide against him, he must oppose the confirmation of their report by the Supreme Court.

2. That where he neglects his remedy in opposing such confirmation, Chancery has no jurisdiction to grant him relief. Such errors of the commissioners upon opening streets in the city of New York, can not be corrected by a collateral suit in Chancery, except in cases where no adequate relief could be had in the mode pointed out by statute. (*Turner v. Williams*, 10 Wend. 139.)

The Chancellor accordingly *reversed* the Vice Chancellor's decree, and ordered the bill to be dismissed but without costs as to C. M. Graham, saying, "as he has possession of a large sum of complainant's which he is permitted to retain on technical grounds merely, I shall not charge the complainant with costs in favor of the appellant or his trustee." The costs of the corporation were allowed only, as upon allowance of a demurrer to the bill and no more.

This case was taken by appeal, on the part of Murray, to the Court of Errors, and the report of it there, is a mere note in 22 Wend. 559.

The reporter says: "This case will be found 6 Paige, 622. Murray appealed from the decree of the Chancellor reversing the decree of the Vice Chancellor of the first circuit, and this court *reversed* the decree of the Chancellor, and modified that made by the Vice Chancellor. Senator Maynard delivered an opinion for reversal; neither of the judges of the Supreme Court delivered an opinion or voted upon the decision of the case. The vote stood, for reversal 10, for affirmance 7.

We have no further report of or information in regard to the grounds of reversal maintained by Senator Maynard, nor of the modifications made by the Court of Errors in the decree of the Vice Chancellor.

THE MAYOR OF BROOKLYN v. MESSEROLE, 26 Wend.
132-142.

Laying out Streets ; Assessment ; Jurisdiction of Chancery.

THE act of the legislature of 23d April, 1835, authorizing the appointment of commissioners to lay out streets, avenues, and squares in the city of Brooklyn, conferred upon them the *exclusive power to lay out streets, &c.*, and all proceedings had subsequently to the 1st September, 1838, by the common council of Brooklyn, for the widening of a street, not in conformity to the doings of the commissioners under that act are void.

Upon a bill filed by owners of land through which the road or street was thus widened by the common council, to restrain the corporation from collecting the assessments upon the plaintiff's property on a sale of the land ; and praying the incumbrance should be declared void, and the laws discharged, and the common council restrained from further proceeding, &c., the Vice Chancellor of the 1st circuit granted the injunction.

On appeal the Chancellor affirmed it ; but

The Court of Errors held that the Court of Chancery had no jurisdiction in the case ; that though it might interpose to stay proceedings in certain cases calculated to cast a cloud over the title to real estate, as diminishing its value, and tending to improper litigation, yet, that an illegality in the proceedings here, such as confessedly made them inoperative and void, afforded no ground for the cognizance of a court of equity, and that the Court of Chancery can not interpose by injunction, where it has not jurisdiction over the principal matter, in the ordinary course of its conceded powers ; except in cases threatening irreparable injury to real estate, or multiplicity of suits. The party must resort to his legal remedy in such a case for redress.

The decrees of the Vice Chancellor and Chancellor, were accordingly *reversed*, by 13 to 8.

STRIKER v. KELLY, 2 Denio, 323.

In S. Ct. 7 Hill, 9.

Assessments for Opening Streets in the city of New York ; Sale for Non-payment ; Appointment of Commissioners of Estimate, &c. ; Passage of Resolution for Opening Streets by the Common Council ; How far Lease is Evidence of Regularity of Sale.

THIS was an action of covenant brought to recover a quarter's rent alleged to be due on a lease executed by Striker to the defendant in 1839. The defence interposed was that the greater part of the premises were sold in December, 1838, under an assessment upon them for opening the Ninth Avenue, by virtue of certain resolutions of the Common Council ; that the plaintiff having neglected to pay the sum assessed thereon, the corporation in Feb. 1840 gave a lease to G. L. for 1000 years. Evidence was given tending to show that notice to redeem was published six months before the giving of the lease, as required by the statute of 1816, and of 1840. (Sess. L. of 1816 and 1840.)

The plaintiff insisted that the defence was invalid : 1. That the statute authorizing the corporation of the city of New York to apply for the appointment of commissioners of estimate and assessment was void, inasmuch as it conferred upon the justices of the Supreme Court a distinct and additional "office or public trust" contrary to the constitution. 2. That it was contrary to the article of the constitution which forbids the "taking of private property for public use, without making just compensation." 3. That the resolution for opening the Ninth Avenue was not passed by *ayes* and *noes*. 4. That there was no evidence of any *demand* made by the collector before the sale, nor of any affidavit of such demand, as required by the act of April, 1816. 5. That there was no evidence of the publication of the notice to redeem in the state paper. 6. That the regularity of the sale in other respects was not sufficiently proved.

The circuit judge charged against all these objections and the plaintiff's counsel excepted. The jury, by consent of

parties found a verdict for the plaintiff for \$34 13 subject to the opinion of the court.

The Supreme Court (Bronson, J. dissenting on several grounds,) decided :

1. That the statute authorizing the Supreme Court to appoint commissioners of estimate and assessment and to order the confirmation of their reports, is not incompatible with that part of the constitution of the state which prohibits the "*justices*" of the court from holding "any other office or public trust." (Bronson, J. dissenting.)

2. That the power conferred by it on the corporation to sell real estate in order to pay an *assessment for benefit* does not conflict with the constitutional provision which prohibits the taking of private property for public use without just compensation.

3. That in appointing commissioners, and in confirming their reports, the court exercises a special and limited authority; and the party seeking to avail himself of its proceedings must show the facts necessary to confer jurisdiction; that its powers in these respects, though derived from and limited by the statute, are *judicial* in their character; and that for the purpose of giving the court jurisdiction, it was necessary to prove among other things that the corporation of New York had decided to open the Ninth Avenue, *before* presenting their petition to the court for the appointment of commissioners: That the fact was sufficiently established at the trial, provided the resolution was properly adopted by the common council. That the objection to it, that it was passed in violation of the act of April 7th, 1830, without calling the *ayes and noes*, was not valid, as that provision should be construed as *directory* merely; and the *form* and *manner* of the passage of the resolution were not essential.

Bronson, J. dissented strongly from this decision.

4. That the rule that a party claiming title under a sale by authority of a municipal corporation for taxes or assessments must show all the facts necessary to prove the sale legal and regular, had been modified by the act of 1816, the *lease* being declared conclusive evidence of the regularity of the sale; and that such lease is evidence not only that the corporation duly advertised, &c., but that the collector had

previously demanded payment of the assessment, and made the affidavit required by the statute. (Bronson, J. dissented also from this part of the decision.)

The court held, however, that the lease is no evidence of the due publication of the notice to redeem.

Beardsley, J., who delivered the opinion of the majority, makes use of the following observations upon the objection that by the proceedings in this case, private property would be taken for public use, without making just compensation. We give them at large, as we propose to notice the question hereafter, in connection with the two authorities he has cited in support of his views. He says:

"It was objected that by these proceedings, private property would be taken for public use, without making just compensation, which is forbidden by the constitution. (Art. 7, § 7.) But no property belonging to the plaintiff was taken directly for the use of the public. This land does not even adjoin the avenue to be opened. Upon the *assumption that the opening of this avenue would enhance the value of his property*, a charge was imposed upon it to pay a part of the expenses thus incurred. This was *local taxation for a local purpose, and falls within the legitimate exercise of the taxing power.* (*Livingston v. The Mayor, &c. of New York*, 8 Wend. 101. *Beekman v. The Saratoga & Schenectady R. R. Co.*, 3 Paige, 45.) In towns, individuals are taxed to make and repair the town highways, and in cities to grade and pave streets. Each town has its local tax for town expenses, as has also each county to meet county charges. These are all *modifications of the taxing power*, and quite as obnoxious to the constitutional objection raised, as is the assessment of lands *benefitted* by the opening of a street, to meet the charge of such an improvement." p. 23, 24.

The Supreme Court having given judgment for the defendant, the plaintiff brought his writ of error to this court.

The Court of Errors reversed the judgment of the Supreme Court. Porter, senator; Gardiner, president; senators Lester and Lott, delivered written opinions in favor of reversal.

Porter, senator, held that the statutes which confer upon the judges of the Supreme Court the powers in question give them another "office or public trust" than that of judges of that court; and in this respect violated the constitution and was void. He held also that the act, being "in derogation of the common law right of the owner, and to be construed strictly, no sale could take place until the *affidavit* of the collector had been made. The affidavit is made as necessary as the assessment. The statute has made it a condition upon which the corporation may proceed to sell; and the courts have no power to dispense with it. It is no answer that the act has declared that the lease shall be conclusive evidence that the *sale* was regular. It is not the regularity of the proceedings *at the sale* or immediately connected with the *act of selling*, that is sought to be impeached. The foundation of the right to sell at all, however regular the sale, has not been shown by the proof."

With this latter view the president and senators above named concurred; though dissenting from the first ground. The judgment of the Supreme Court was accordingly reversed—16 to 1.

The following resolution was then proposed and adopted.

"*Resolved*, That the making of the *affidavit* by the collector as required by the act of 12th April, 1816, for the more effectual collection of taxes and assessments in the city of New York, is an essential part of the power to sell for assessments or taxes under the provisions of that act; and that the lease given by the corporation is not evidence that such an affidavit has been made so as to support the sale, without proof of the making of such affidavit *before* the premises were advertised for sale."

On the question of adopting this resolution all the members of the court present (14) voted in the affirmative, and it was accordingly adopted as the ground of reversing the judgment of the court below.

¶ The principle embodied in this resolution seems so clear and unquestionable that it is difficult to conceive how it should ever have been successfully contested in the Supreme Court. The case of *Jackson ex d. Clark v. Morse*,

18 J. R. 441, is founded on the same general principles, both as to the authority of the comptroller to sell for taxes, and the evidence of the fact authorizing the sale.

With respect to the other ground of reversal urged by Mr. Senator Porter, and on which Mr. Justice Bronson had dissented from the majority of the Supreme Court, viz : that the authority conferred on the judges of that court was incompatible with the constitution, as conferring a distinct "office or public trust," it is not our design to enter into any discussion. Whether incompatible with that clause of the constitution or not, there can be no doubt that it is wholly incompatible with every thing like a judicial proceeding, as understood in a legal sense. On grounds of expediency, it is very doubtful if the powers exercised by them, could be vested in any depository less fitted to act as street commissioners in adjusting the claims and regulating the assessments for opening and widening streets in the city of New York. The consequence has been what might naturally have been expected ; that cases of the grossest abuse, of the most cruel individual hardship and oppression have gone unredressed and virtually unheard. But that is a subject as foreign to the constitutional powers of the court as to the other ground of reversal.

There is, however, another constitutional objection raised in the case of *Striker v. Kelly*, in the Supreme Court, upon which the Court of Errors did not pass, but which was adjudicated upon and briefly discussed in the opinion of Mr. Justice Beardsley. (See the extract from his opinion, ante, p. 444.) It was objected in that court that this "*assessment for benefit*" was contrary to that provision of the constitution of 1821, which declared that "private property shall not be taken for public use without just compensation." In the examination the learned judge bestows upon this question, there are three propositions, rather assumed than discussed, which require to be carefully considered in arriving at a correct conclusion. He says then : 1. That by the assessment on the land of the plaintiff for the *benefit* to be derived from opening the avenue, no *property* belonging to the plaintiff was taken for the use of the public. 2. That the *charge* thus imposed upon his land was on the *assumption* that the opening

of this avenue would enhance the value of his property, and, 3. That this was a *local taxation* for a *local purpose* and falls within the legitimate exercise of the *taxing* power."

Before treating of these in detail, a glance at the nature and extent of this power of taking private property for public use will be useful, as it is established by the public law of civilized nations; with the limits the publicists and jurists assign to it. Those are a part of the law of our land, paramount to all written state or national constitutions. The power is derived solely from the right of *eminent domain*, residing in the society or sovereign, or that portion of the government exercising supreme authority.

The right of *eminent domain* is thus defined by Vattel: "The right which belongs to the society or the sovereign of disposing, in case of necessity and for the public safety, of all the wealth contained in the state, is called the *eminent domain*." 2 Vattel, b. 1, ch. 20, § 244. He adds a qualification to this right, which has been adopted as a principle by all civilized nations. "When, in a case of necessity the society or the sovereign disposes of the possessions of a community or an individual, the alienation will be valid. But justice requires that this community or this individual be indemnified at the *public charge*; and, if the treasury is not able to bear the expense, *all* the citizens are obliged to contribute to it; for the burdens of the state ought to be supported *equally* or in a just proportion. The same rules are applicable to this case as to the loss of merchandize thrown overboard to save the vessel." *Id.*

These are great principles of right which lay at the foundation of civil liberty. They are a part of that imprescriptible, absolute right of property which is, as Sir William Blackstone says, "probably founded in nature;" at all events founded in reason, and without which civilization and public tranquillity could never be preserved. "So great moreover," says Sir William, "is the regard of the law for private property, that it will not authorize the least violation of it: no, not even for the general good. If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public: but the law permits no man or set of men to do this without con-

sent of the owner of the land ; it would be dangerous to allow any private man, or even any public tribunal to be the judge of this common good and to decide whether it be expedient or no. In this and similar cases, the legislature alone can and indeed frequently does interpose and compel the individual to acquiesce. But how does it interpose and compel ? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate for a reasonable price ; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." (1 Bl. Com. p. 139.)

Trite and elementary as these principles are, with regard to taking private property for public use, and the duty of the public for whose use it is taken, to make just compensation ; professedly, as they are wont to be assented to in all our halls of legislation and tribunals of justice, they have been more than once lost sight of in both. It is a terrible prerogative when delegated in the most careful and guarded terms and exercised in the tenderest and most delicate manner, that of taking private property at will for a real public improvement. But when conjoined to that, speculative, fanciful, and often positively injurious mis-called *improvements* are projected and their public responsible projectors, for instance, the common council of the city of New York, are armed by the legislature with a power to *take the land* of one or more individuals for opening and widening streets, and to *take the money of other individuals* who are unfortunate enough to have other lands in the vicinity, to make compensation ; it becomes alarming ; it should be challenged and scrutinized closely indeed, before it is allowed to gather more strength from use and prescription.

In the case of *Rogers v. Bradshaw*, 20 J. R. p. 105, 106, (ante p. 101) Ch. J. Spencer well expresses the general principle upon this subject of taking private property for public use. "The fifth article of the amendments to the constitution of the United States forbids the taking of private pro-

erty for public use without just compensation. The same inhibition to the power of the legislature is contained in the late amendments to the constitution of this state in 1821. I do not rely on either as having a binding constitutional force upon the act under consideration. The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative. But they are both *declaratory* of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice. This all important and essential principle was somewhat illustrated in the case of *The People v. Platt*." (17 J. R. 215.)

These were the principles asserted and vindicated by the decision in *Bradshaw v. Rogers*. They were not controverted in the Court of Errors, although that court reversed the decision on other grounds. (*Ante* 101.) We may thus see at every step, that both in England and this country, the exercise of the right of eminent domain, has been jealously watched; limits have been assigned, and conditions imposed, sufficient, if duly respected, to guard against abuse and oppression. The rights of private property are now shielded from the encroachments of this sovereign prerogative, by three constitutional guaranties:

1. That the sovereign or society taking private property for any public use, shall make the owner just compensation.
2. That the compensation shall be made a charge upon the public, for whose use it is taken; or as Vattel expresses it, "that the same rules shall be applied to this case, as to the loss of merchandize thrown overboard to save the vessel."
3. That the public shall not impose upon other individuals this charge of indemnification, which properly belongs to the whole community for whose immediate use or on whose direct demand the property is taken.

Does the opinion then of Mr. Justice Beardsley on this constitutional objection keep these principles steadily in view? For, if each of them is not equally respected, in the prac-

tical exercise of this power, no one of them retains its value.

And first, is it true as he affirms, that by this charge on the land of the plaintiff in *Striker v. Kelly*, "no property of the plaintiff was taken for the use of the public?" If by property the learned judge means that no land was taken, then he certainly establishes the proposition; for the very next sentence states that the plaintiff's land does not even adjoin the avenue to be opened. But is not assessing upon an individual a round sum of money to pay for the land taken for the public use, upon some idea that he is of all others of the public to be specially benefitted by the public use to which it is to be applied, is not this taking his property? Whether you take my land for a public road, or take that of my neighbor, and assess his whole damages on my land, because the road may be an incidental benefit to mine, in either case you take my *property* for the public use.

If the state requires certain land for a *canal*, or a county requires land for a court-house, and the owners refuse to sell at a reasonable rate, the sovereign power has the right to appropriate the land to the public use it is required for; but it has never yet said in either case, to owners of adjoining property, however much it may be enhanced, "you who are individually benefitted, must, as individuals, pay for the public." Is it the private benefit or the public good which this interference with the right of private property is intended to promote? Assuredly the public benefit is the only motive and ground which can justify it. No private benefit alone can afford the slightest pretext for making a *public way* over the lands of an individual. The mode of obtaining a private right of way provided for by our statutes, and now by our constitution, where a necessity exists for one, fully recognizes and respects this principle. Is there any principle of public or municipal law, that authorizes the taking of land from one individual for public use, and taking the money of another individual or of several individuals, to pay the debt of the public for the land so taken? Is this anything more or less than saying, "We may not take A.'s land for public use without compensation; but we may make B. and C., his nearest neighbors, pay him that compensation?" Would the

property of B. and C. be any less taken for public use, than that of A. himself? Is the assumption of Mr. Justice Beardsley, then, that "no *property* of the plaintiff was taken for the public use," to be sustained upon principle? The property of every man who pays a tax to the public, is so much devoted to, and taken for the public use. But those taxes are general and not special forced contributions. And does not this constitute the sole distinction between taxation, and that taking of private property for public use, provided for in the constitution? If an individual is assessed for what the public ought to pay out of the common treasury provided by *equal* public taxes, is not the amount of his assessment, though it may, in the progress of a generation or two, be returned to him or his heirs, twenty fold, a *charge* imposed unjustly and against the spirit of the constitutional provision? Is it not paying a debt contracted by and for the public with the money of an individual?

To these questions, it is confidently believed that no jurist would hesitate to give a prompt affirmative, while the case was confined to taking the property of one individual for public use, and compelling another individual to make the compensation. It would then be pronounced a clear invasion of the right of private property; a gross violation of the letter and spirit of the constitution. In the case here put the conclusion is irresistible; there is no room for fallacy.

Then, is the principle of these assessments for *benefit*, any the less an infraction of the constitutional provision, because the contribution is levied upon twenty or one hundred owners of real estate, than if levied upon one, two or three? The actual oppressiveness is diluted, it is true, as the assessment is diffused over a larger surface; but the taint of unconstitutionality remains as long as the principle is to be traced; as long as individuals are made to pay what the public ought. When we say the *public*, we mean the *organized municipal public*, whether called by the name of town, county, city or state, for whose use it is taken. To single out certain individuals as specially chargeable with giving the public a street, which all the world has an equal right to travel, and where many, in fact, no doubt, do travel much oftener than those who are so assessed, was a bold

stroke at private property in those who framed our laws for opening streets. For to what possible public use can land be applied, which gives to the whole public, so full, so perfect an equal right and enjoyment as a public street or road? Then should not all who thus enjoy, contribute to compensate the owner? And is there, can there be, any other equal mode of levying that contribution from all, than by the general system of taxation adopted in all other cases? It is this public use of the property which creates the obligation on the part of the public to pay for it. But no individual benefit to be derived from opening a street, by owners who happen to have lands near it, belongs of right to the public. That is as much the private property of the owner, if it really does accrue, as his lands themselves. For the benefit he derives from opening or widening a street, he ought to contribute as one of the public, in the shape of his portion of the general tax imposed for the purpose and no more: Unless, indeed, the *special charge* assessed upon his land for "benefit and advantage," as it is called, can be sustained as falling within the range of what Mr. Justice Beardsley calls "a local taxation for local purposes," (p. 24. Ante p. 231.) He says:

"This was local *taxation* for a local purpose, and falls within the legitimate exercise of the taxing power." (*Livingston v. The Mayor &c., of New York*, 8 Wend. 101. *Beekman v. The Saratoga and Schenectady Rail Road Co.*, 3 Paige, 45.) In towns, individuals are taxed to make and repair the town highways, and in cities, to grade and pave streets. "Each town has its local tax for town expenses, as has each county to meet county charges. These are all *modifications of the taxing power*, and quite as obnoxious to the constitutional objection raised, as is the *assessment of lands benefitted* by the opening of a street, to meet the charge of such an improvement."

Now, what possible point of resemblance was floating in the learned judge's mind, between these arbitrary assessments on the land of a few individuals, for benefit that may or may not be realized; and the regularly assessed, legal, general taxation of a town or county, it is impossible to conjecture. Is there any, the slightest respect, in which the

cases are alike? The expense of opening new roads in towns, is borne by all the taxable inhabitants of the town; it is raised by the same system of general, equal taxation, as all other sums for the town expenses. Nobody ever heard of commissioners of highways in towns on opening a road, assessing any particular land owners for *special benefit*! The statute does not give them the power, and if it did, such a "modification of the taxing power," would be as obnoxious to the constitutional objection, as the arbitrary special assessment for benefit, in the city of New York. There is therefore no more countenance or support to be derived from the fact, that towns are empowered to lay a general tax for town purposes, than from the fact that the state also imposes general state taxes for state purposes.

How then, can this proposition be sustained, that it is *local taxation* for a local purpose? That it is entitled to be called a *tax* in any legal sense of the term? Not only upon principle, but upon authority also, is it impossible to bring those assessments within any definition or idea of a *tax*. This point was expressly adjudicated in *The Matter of the Corporation of New York, in re improving Nassau Street*, 11 J. R. 77. The church *Du St. Esprit*, in Pine Street; the Presbyterian church in Wall street; and the Scotch church in Cedar street had been assessed for the widening of Nassau street: the first, \$1273; the second, \$1981, and the third, \$410. The churches opposed the confirmation of the report on the ground that they were exempted from such assessment under the statute provision that "no church or place of public worship should be *taxed* by any law of this state." But the court held that their claim to total exemption was not well founded; that the statute referred only to general and public taxes, to be assessed and collected for the benefit of the town, country, or state *at large*. The court say: "The word *taxes*, means burdens, charges, or impositions, put or set upon property for public uses: and this is the definition Lord Coke gives of the word "*talliage*;" (2 Inst. 532.) and Lord Holt in Carth. 438, gives the same definition in substance of the word *tax*. But to pay for the opening of a street in a *ratio* to the benefit and advantage derived, is no *burden*. And they cited the maxim: "*qui*

sentit commodum sentire debet et onus. The maxim is an ancient and a goodly one ; but if the learned and able judges who cited it had stopped to enquire for an instant, *whose* was the *commodum*, they would have found that the *onus* legally belonged in a very different quarter. The court did not advert to the use which the public have of the land taken for a street, and that the corporators of these churches had no more right to the enjoyment of the easement, or, in other words, the *commodum*, than any other portion of the public. The public benefit is entirely lost sight of in this arbitrary system of assessing benefit upon individuals. It was a cunning as well as a bold system of appropriating private property to the public use, when it was first established. As the late Mr. Van Vechten, in his argument in *Beekman v. The Saratoga and Schenectady R. R. Co.*, 3 Paige 51, expressed it: "In 1807, this *great system of embellishing* the city of New York was first *invented*." But bold as it was in its first invention, its practical administration since has been yet more reckless; the levity, and wantonness, and abuses in its execution have been the natural and inevitable consequences of the utter disregard of the constitutional rights of private property in its origin. These so called "*improvements*," have, in almost every case, been wholly effected by heavy assessments on individuals to pay for what the public enjoys. In many instances, they have been a series of experiments to raise the speculative price of unimproved lots: in others, to answer some private purpose, of even more questionable character. But we cited the case from 11 J. R., only for the purpose of showing that these assessments for *benefit* cannot be sustained as a *tax* in any sense of the word. The Supreme Court, on the contrary, very frankly put it upon the express ground, that the *public* have a right to relieve themselves from paying for a street or road, by appropriating to themselves all the incidental benefit and advantage which a few individuals may possibly derive from its opening. In other words, putting those few persons into their own place and compelling them to bear all the burden which by the constitution is imposed upon themselves.

Now, if this system cannot be sustained as a *tax* for a local purpose, is there any other power to be found in the cases

cited by Mr. Justice Beardsley, in virtue of which it may be upheld? The case of *Livingston v. The Mayor, &c. of N. Y.*, was that of an owner who, for several years had been selling lots *bounded on a street* laid out in the plan of the city, but not actually opened, as in the case of *Graham v. Murray*, (ante p. 439.) The street being opened, and his damages having been assessed at a mere *nominal* sum, he now opposed the confirmation of the report. Several questions were made in the case; but the only one material to our present purpose, was the ground insisted on by the owner that the increased value of adjacent property belonging to him could not be set off against the property actually taken.

The Chancellor discusses this objection in the following paragraph:

"It is not denied that the legislature have the power to authorize the taking of private property for the purpose of public streets, upon making just compensation to the owners: but the plaintiffs counsel insist that the increased value of adjacent property belonging to the same individual cannot be set off against the loss or damage sustained by him in taking his property for a street, and be considered as a just compensation for the property so taken. The owner of the property taken is entitled to a full compensation for the *damage* he sustains thereby, but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages. Besides, it is a well settled principle, that where any particular county, district, or *neighborhood* is exclusively benefitted by a *public improvement*, the inhabitants of that district may be taxed for the whole expenses of the improvement, and in proportion to the *supposed* benefit to each. In this case, if the whole value of the property taken for a street in the city of New York is allowed to the individual owner, the proprietors of the adjacent lots must be assessed for the purpose of paying that amount, and if the individual whose property is taken, is the owner of a lot adjacent, that lot must be assessed rateably with the others. It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance, and is assessed for his portion of the *damage*! or whether the one sum is off-set against the other in the first place, and the balance only is allowed."

"Assessed for his portion of the damage!" Can anything show the absurdity and the enormity of the whole system more strongly than this? The party is to be assessed for his *portion of the damages* sustained by himself, in taking his land for the public use! To pay the owner for his land, you charge all the land he owns, in the "neighborhood," as the Chancellor expresses it, with the damages he has sustained! Is this making just compensation? What, again and again we ask, has the public that takes the land for a street, to do with the "benefit," that individuals may incidentally derive from it, by means of other property? But, says the Chancellor, "if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages." Indeed! Then the equitable consequence is, that if the owner's benefit, greatly exceeds the land taken, he has no equitable claim to such excess of benefit; and it belongs equitably to the public, which has done him the favor of taking his property! For, the same reasoning which would establish the right of the public to any part, would give them a full equitable claim to the whole, and he ought to refund to the public. Thus, an owner who had lost five lots worth \$5,000, by being taken for a street, if he happened to own fifty others adjacent, may be, and sometimes actually has been assessed \$10,000 for benefit, and thus compelled to pay \$5,000 for the *privilege* of having his five lots taken and occupied by the public. The public, the only occupant, goes entirely scot-free, and makes him not the slightest compensation for its perpetual enjoyment of his land!

Thus far the Chancellor's opinion in the case of *Livingston*, is but a repetition of the idea of the Supreme Court, in 11 John. 77; that "*qui sentit commodum, sentire debet et onus*:" but the "*commodum*" of the public in the use of the street, seems to have no more occurred to him, than to the Supreme Court.

But there is a fallacy in the very statement of the question, by the Chancellor, which must not be allowed to pass without exposition.

He says: "The owner of the property taken is entitled to a full compensation for the damages he sustains thereby;

but if a benefit rather than an injury accrues to him, he certainly has no claim to damages." This is not the language nor the spirit of the constitutional provision. That ordains that you shall pay for the *property taken* : it says nothing of *damages* or *benefit* ; nor that you may take the property and leave the owner to indemnify himself if he can, by the benefits which may eventually accrue to him, his heirs or assigns. The very terms of the Chancellor's premises, then, are erroneous ; the true proposition is ; the owner of the property taken, is entitled to a compensation equal to the value of it. That is the broad *fiat* of the constitution ; and it leaves no room for speculating upon probable or possible benefit that may incidentally accrue to the other property of the owner. If the constitution had said "damages over and above his probable or possible benefit," then the Chancellor's statement of the question would have been correct. But no such loose, uncertain and arbitrary rule, is to be found in the constitution. That provides that you shall pay for what you take ; not in visions and pictures of future and possible enhancement of the value of other land, but in the same current coin an individual purchaser would pay for it. For, after all, as Sir William Blackstone says : "The public is now considered as an individual treating with an individual for an exchange." It is the public that purchases for its own use ; not for the use or advantage of a few individuals owning land near the street to be opened. It is the public acting for itself, and not as the self appointed agent of other land owners of the vicinage.

We come, then, to the other ground upon which the Chancellor in the case under consideration, rests the constitutionality of these assessments for benefit. He now departs from the mere equitable ground of the Supreme Court in 11 J. R. 77, "*qui sentit commodum*," &c., and attempts to eke out the power, under the color of a tax, for a *public improvement*, for the *exclusive benefit* of a particular neighborhood. These are his words upon this part of the subject : "Besides, it is a well settled principle, that where any particular county, district, or neighborhood, is exclusively benefitted by a public improvement, the inhabitants of that district may be

taxed for the whole expenses of the improvement, and in proportion to the supposed benefit to each." Now what "public improvement," can the Chancellor point out for the exclusive benefit of any county, town, or district, which is ever paid for otherwise than by a regular county, town, or district tax, levied without regard to the supposed benefit to each? There is no law, no statute, authorizing any such arbitrary levies of taxes upon individuals, "in proportion to the supposed benefit of each;" except these laws for assessing "benefits," in New York and some other cities. The smallest municipal "districts," authorized by law, road districts for the repair of highways, have no such feature of taxation. The tax is general and equal as for other public purposes, and no inquiry is authorized by the statute as to the proportion of supposed benefit to each, as a rule in assessing the taxable inhabitants. But what shall we say of this proposition, as applicable to the case before the Chancellor, when we find him assuming that the street in question is opened for the *exclusive benefit* of the parties who owned lands in the neighborhood? That therefore to lay a tax on that neighborhood, to pay for it, is a well settled principle? It is a mere repetition of foregone conclusions, to say, on the other hand, that the public at large are the parties exclusively benefitted by a public street; and that the owners of the land in its vicinity are only benefitted by the use of it in proportion to their numbers, compared with those of the public at large. But whence is this so well settled principle of taxing a neighborhood derived? We have all heard of state, county, town, and city taxes: but who ever heard of a neighborhood *tax* before? Who is to assess, who to levy it, for what purposes, and who is responsible for the application of it? But let us deal fairly with this proposition of the Chancellor, in regard to taxing neighborhoods. He only lays it down as a well settled *principle*; he does not affirm it to be a well settled *practice*. Now it can not be denied that in point of principle, or rather of departure from principle, there has been one instance of legislation in our state, similar to that of compelling a few individuals in the city of New York, to pay for the land taken for public streets, upon the plea of incidental benefit. But

long before the measure could be practically carried into effect, it was condemned and abandoned.

By the act of April 15, 1817, (S. Laws of 1817, p. 302,) which was the fundamental law for the construction of the Erie and Champlain canals, the legislature, then casting about for ways and means to execute a vast design, did incorporate a section in that act, (§ 7, 305,) imposing a tax of \$250,000. for the benefit of the canal fund, upon the lands lying on each side of the canal, within 25 miles of its route. This section provided that "it shall be the duty of the canal commissioners to raise the sum of \$250,000, for the canal fund, by causing that sum to be assessed and levied, in such manner as the said commissioners may determine and direct, upon the lands and real estate lying along the route of the canal, within 25 miles on each side; to be levied and assessed in such proportion for each, as the said commissioners shall determine; to be raised, either by sale or otherwise, as they shall deem meet; and the assessment shall be made on said lands, according to the benefit which they shall be considered by the said commissioners as deriving from the making of the said canals respectively;" it also provided that the rules, &c., for that purpose of collecting, &c., should be sanctioned by the Chancellor and judges of the Supreme Court, or a majority of them; and that any subscription of money or other property toward the completion of the canals, by any proprietor of such lands, should be deducted from his tax or assessment.

This section was by an act passed the 7th day of April, 1819, in fact repealed, though in form, only "*suspended* until the further order of the legislature thereon." In March, 1820, the then canal commissioners, Dewitt Clinton, Stephen Van Rensselaer and Myron Holley, made an able and elaborate report, upon the general subject of the canals, and particularly, upon the financial measures already, and to be further adopted, to ensure their completion. In this report, the tax or assessment in question, without it is true, raising any constitutional objection to it, was fully discussed; and upon considerations of its inequality, inconvenience, and oppressiveness, if not impracticability, it was condemned without reserve. (See 2 vol. Canal Laws, 458-462, published under

authority of the legislature, in 1825.) The report after pointing out these features, says: "The inconvenience of this mode of raising money would soon be apparent to everybody, and it would become justly odious." Again, "The inconvenience and expense of collecting such a tax, afford very strong reasons against the expediency of it." This report gave the death-blow to this contemplated system of neighborhood taxation. And who will not admit, most justly? The legislature and the state at large, had begun to comprehend that these great avenues of commerce and intercourse were not neighborhood improvements, but were to be vast state and even national channels of intercommunion, not only for all those who might traverse them during the present and future generations, but for the benefit of all those who might receive through them the accumulated products of the wide extended regions which were beckoned to their embrace. But if the principle of this taxation of the land within 25 miles of the canal were sustainable, what was there to prevent the legislature from imposing the whole expense of this noble work upon the owners of those lands? It would have been no violent, but a very reasonable assumption, that they would be benefitted not merely to the amount of the \$6,000,000, at which the cost of the Erie canal was estimated, but thrice and four times that amount. They have reaped advantages almost incalculable; those of them who have lived perchance, to enjoy them. But what a monstrous act of oppression, of arbitrary and unconstitutional exaction, if the whole expense of these public improvements, had been levied upon their lands on the pretence of *exclusive* benefit. And yet that would have been, according to Chancellor Walworth's "well settled principle" of taxation, a mere *tax* imposed upon the neighborhood, which was "exclusively benefitted by that public improvement." For so the owners of land adjacent to the canal might as well be considered as the owners of lots in the neighborhood of a street to be dedicated to the public. The fallacy of this lies in the very statement of the question. The public obligation to pay, is co-extensive with its power to take. It takes for its own use and benefit; and it has no right to indulge in any speculation as to other benefits than its own. It has no right to ask the owner of property thus taken,

whether he "has not other land in the neighborhood?" He might well reply to such a question, "take my land, since you have the power; but pay for what you take, and depart in peace."

The Chancellor refers in the case of *Livingston v. The Mayor, &c.*, to the other case cited by Mr. Justice Beardsley on this subject of taxation. The Chancellor says: "I have recently had occasion to examine this question as well as that of the right of a party to a jury to assess his damages, in the case of *Beekman v. The Saratoga and Schenectady R. R. Co.*, not yet reported." This is the case cited by Mr. Justice Beardsley, as an authority to establish his proposition, that assessments for benefit are but a "local tax for local purposes." But in the case itself, the question did not arise; nor was it discussed at all by the Chancellor. We find nothing in his opinion that has the slightest bearing on that subject; nothing which countenances the idea which he put forth in the case of *Livingston v. The Mayor, &c.*, that you have a right to take the land of an individual for public use, and pay him for it with some other land he may own in the neighborhood. For, paying him in that currency, is paying him in effect with the land to which the benefit is supposed to accrue.

Then, as to the property of other owners in the vicinity of a new street, about to be opened, can anything have a more direct tendency to depress the market value of their lots, if they are on sale, than this new creation of so many rival lots, to be brought into direct competition with their own, the moment the street is to be opened? The parties most certain to be immediately injured in their sales, are by this system selected to contribute for the pretended benefit! They are, in many cases the real losers, without reference to their assessments; they are then made to pay all for the street, while the only party benefitted, the public, pays nothing. That gives itself no trouble to inquire whether the speculative benefit assessed upon the "neighbors," is ever realized or not; still less, in their searches after victims of incidental benefit, do the assessors ever turn aside to ask for the sufferers by these incidental injuries. A system so evidently arbitrary, unequal and unjust, even if its constitutionality were less doubtful, ought not to be permitted a

longer existence. It does not comport with the first principles of taxation ; it violates them all in taxing individuals upon future possible benefit, as a basis of taxation ; its practical benefits are few and uncertain ; its abuses, manifold and inevitable.

It cannot be claimed that the act for laying the tax of \$250,000 upon the lands within 25 miles on each side of the canals, adds any force or sanction to the principle it embraced. It was immediately abandoned, never to be revived. So far as principle and practice are concerned, this system of assessing benefits upon neighboring owners, stands only upon its own pretensions, as to principle and precedent. If the former is wanting, on the ground of constitutionality, precedents and prescription are not yet sufficient to maintain it. The question, in fact, in this shape, was not presented to the Supreme Court in the case of *Striker v. Kelly* ; and if it had been, as that case was reversed in the Court of Errors, though on other grounds, the subject is still open for examination in the court of dernier resort. The question in the case of *Livingston v. The Mayor, &c. of N. Y.*, was essentially different. The owner whose property was taken, and who had been paid in benefits to other lots, insisted that he was entitled to compensation for what was taken without regard to the suppositious benefits. This rule the Chancellor certainly dissents from, as we have seen : and though on the ground of "neighborhood" taxation his opinion contains nothing to support his views, yet it must be frankly admitted that the legislature, in the canal act of April, 1817, before alluded to, has prescribed a mode of assessing compensation to owners of lands, taken for canal purposes, which in this respect is liable to the same objection as that which was complained of in the case of *Livingston v. The Mayor, &c.* By the third section of that act, it was provided, that, "for all *lands, waters, and streams* taken for the purposes of the canals, it shall be the duty of the canal appraisers, or a majority of them to make a just and equitable assessment and appraisal of the *loss and damage*, if any, *over and above the benefit and advantage* to the respective owners or proprietors, or parties interested in the premises so required. (This provision is re-enacted in 2 R. S. 211, § 50, 2d ed.)

No question, as to the constitutional propriety of this mode of ascertaining the compensation for property taken under this act, appears to have been agitated before our tribunals. Probably both the liberality of the canal appraisers to owners, and the deep interest taken by the latter in so great and beneficial a public work, have led to this acquiescence. But in a recent case, a question arose which appears to have some bearing on the constitutional principles which ought to govern in ascertaining as well as paying the compensation. In the case of *The People ex rel. Utley v. Hayden and others, Canal Appraisers*, 6 Hill, 359, a motion was made for a mandamus against Hayden and others, canal appraisers. A section of the Black River Canal crossed the farm of the relator, in Oneida County, and that portion of it was nearly finished when the work was suspended. In May, 1843, he presented a claim for damages to the canal appraisers, amounting to more than \$2000; but they declined to act upon it, assigning as a reason that doubts were entertained of their jurisdiction. It was insisted on the part of the canal appraisers, that no appropriation of the land of the relator takes place, within the meaning of the statute, until the work on the canal is finished; and that until that period no appraisalment and payment of his damages could be required. The relator contended, on the other hand, that as the state had fixed upon the route, and taken permanent and exclusive possession of the lands and commenced the execution of the work, the appropriation had taken place, and the canal appraisers had jurisdiction to proceed in assessing his damages, &c.

Nelson, Ch. J. in delivering the opinion of the court says :

“The only question is, whether the facts before us disclose a case of such an appropriation. If they do, the appraisers should go on and discharge their duty; and if they refuse, a *mandamus* is the appropriate remedy.”

“Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the state itself, that at least, certain and ample provision must first be made by law (except in cases of public emergency) so that the owner can coerce payment through the judicial

tribunals or otherwise, without any unreasonable or unnecessary delay. Otherwise the law making the appropriation is no better than blank paper. (*Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Wend. 9.)

"The statute places the right to have compensation made where the principle of the constitution places it, viz: upon the forcible divestment of the use and enjoyment of private property for the public benefit; and not as contended in behalf of the people, upon the completion of the public work for which it is taken. The latter is a question in which the individual has no special interest, depending upon the will or wisdom of the legislature, and all the considerations which usually enter into and influence legislative action. The work may be completed in one, two, or more years, or it may never be completed."

"The statute before us places the right to compensation upon no such contingent and fluctuating basis. When the public agents have entered upon and taken possession of the property in the manner contemplated by the statute, (1 R. S. 206, § 16, 2d. ed.) the event has happened which entitles the owner to an appraisal of his damages. Though the work should never be completed, it is all the same to the owner; except that he may thus be deprived of the *benefits* which the appraisers are required to *deduct* from the *damages* sustained. But that, perhaps, is a *wrong* without a *remedy*." Mandamus accordingly.*

Now, if the learned Ch. Justice, when he had arrived at this conclusion, had but looked beyond the statute before him, so far as to the constitutional provision on this subject of compensation to the owner, he would have discovered that the "wrong" which he deploras as one remediless, was susceptible of a very plain and easy remedy, by merely adhering to the language of the constitution. That declares as explicitly as words can express it, that for private property taken for public use, the owner shall receive a just compensation. Ch. J. Nelson himself holds it to be "the settled doctrine, even as it respects the state itself that at least *certain* and

* In *Baker v. Johnson*, 2 Hill, 342, the Supreme Court held that "no formal resolution of the canal commissioners to take the land was necessary. Entering on the land and laying out and commencing the work amounted to a sufficient appropriation; although the absolute fee did not pass to the state until the appraisal of the damages." p. 347.

ample provision must first be made by law (except in cases of public emergency) so that the owner can coerce payment of the amount of his compensation, through the judicial tribunals or otherwise, without any *unreasonable* or *unnecessary* delay." But when you make the owner's compensation depend upon *benefits* estimated of which he may be deprived, not only by the non-completion of the work, but by a thousand other unforeseen contingencies, how can it be said that "*certain* or *ample* provision is made by law so that the owner can coerce payment?" How is he to *coerce* payment by the judicial tribunals or otherwise of the amount of benefits thus deducted from the fair value of his lands? Where is he to get this prospective addition to the price of his other lands, discounted for something certain and tangible? Where is the mint in which these golden promises of future profit can be stamped with current value? The state has provided none; it offers no guaranty that the estimates of benefits made by its canal appraisers shall be realized in one, ten, or twenty years. Therefore, as Ch. Justice Nelson says of the statute, so say we of the constitution: "It places the right to compensation upon no such contingent and fluctuating basis." It has made no such currency a legal tender for property taken for public use.

But this rule of estimating benefits from the land, against the damages of the owner, is comparatively harmless, in itself; at all events, no complaints have been heard before our legal tribunals of its practical operation. It may be because it has been essentially disregarded in awarding the compensation for lands taken for canal purposes. In principle, it seems to be liable to the constitutional objection, pointed out, if that be well founded. But even in point of principle, it falls so far short of the system of arbitrary exactions, carried on in the city of New York, under the name and pretence of assessments for benefits, that it can scarcely be placed in the same category. The power delegated to the common council by that system is nothing less in practice than the absolute right of *eminent domain*. It might admit of great doubt, how far such a delegation of that power by the legislature, is consistent with the first princi-

ples of constitutional legislation. But if it have the right to delegate that prerogative, it has no right to confer a power which itself does not possess; that of taking private property for public use without just compensation by the public to the owner. The return to that true constitutional ground of itself, would erect a firm barrier against that flood of waste, injustice, and oppression, which from the first origin of the system, has swept in turn over nearly every portion of our city. The decision in the case of *Striker v. Kelly*, it was thought, would have some good tendency toward the protection of the rights of private property against it. But it was a temporary check only, if at all; and the tide is again returning with renewed force. The common council is again as busy as ever in searching for new objects on which to shower its benefits. So impatient is their zeal to do good *in invitato*, that they could not even wait for the passage of a law to confer the power of appointing commissioners of estimate and assessment on some other tribunal than the Supreme Court; although the new constitution has expressly prohibited its judges from "exercising any power of appointment to public office." (Art. VI. Sec. 8.) The city councils have taken the grave responsibility of going on with proceedings to open new streets and avenues, and applying to have commissioners appointed by the Supreme Court, as if no such constitutional prohibition existed. They are running the imminent hazard of having those appointments and all the wastefully expensive proceedings consequent upon them, at no very remote period, declared *coram non judice*; utterly null and void. If those commissioners are not public officers, what are they? If such an employment is not as Chief Justice Marshall* has judicially sanc-

* See the case of *The United States v. Maurice and al.* 2 Brockbrough's Rep. 96, where Chief Justice Marshall held, that an *agent of fortifications* was an *officer* of the United States and must be appointed by the President and Senate, and that an appointment by the Secretary of War was a mere nullity. He there says, "Is the agent of fortifications an officer of the United States. An office is defined to be a "public charge or employment," and he who performs the duties of the office is an officer. If employed on the

tioned the definition of an office, "a public charge or employment," what else is it, and what is its name? This is a constitutional objection that might easily have been obviated by vesting the power in the New York Superior Court, or in the Common Pleas. But, as if to multiply designedly constitutional objections to their proceedings, the councils have not, it would appear, deemed it of sufficient importance to occupy their wisdom. Perhaps, however, they have a right to indulgence, as such subjects are, to be sure, quite foreign to their studies and pursuits.

Nor, perhaps, ought the general subject of these assessments for benefit to be pressed upon their overtaken understandings, with a view to the correction of its abuses; still less, to its annihilation, as radically and fundamentally unconstitutional. For redress against the system on that ground, it is in vain to look elsewhere than to the legal tribunals whose duty as well as prerogative, it is to uphold, at whatever cost to public bodies or to individuals, the constitutional guarantees of the rights of private property. It is as dangerous to prophesy results of judicial deliberations upon questions of constitutional interpretation, as upon any other subject of forensic debate. But whenever this question shall be presented to the court of dernier resort, there can be no room to doubt that it will there receive the most deliberate attention and investigation in all its extent; and that no considerations of expediency or of mere inconvenience to

part of the U. S., he is an officer of the United States. Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules, prescribed by the government; and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station without any contract defining them; if those duties continue though the person be changed, it seems very difficult to distinguish such a charge or employment, from an office, or the person who performs the duties from an officer." 2 Brock. R. 103.

Tested by this definition, commissioners of estimate and assessments are clearly such "public officers," as the Supreme Court are prohibited from exercising any power of appointing by the clause of the constitution of 1846, cited above.

our municipality, will prevent that high tribunal from overthrowing the whole system if found to be in derogation of the constitutional provision, and the rights of the citizen.

SURETY. •

MORRIS and MOWATT, assignees of COMFORT SANDS, a bankrupt, v. ISAAC CLASON, impleaded with GEORGE STANLEY, 10 J. R. 524.

In the Court of Errors,

CLASON, appellant, v. MORRIS and MOWATT, respondents,
10 J. R. 524.

Opinion of Lansing, Ch., given 10 J. R. 530-535.

Surety.

THE decision in this case turned so much upon different views of the evidence in the cause, taken by the Chancellor and by the Court of Errors, or a majority of them, that it would be rather giving a view of the matters of fact in controversy with respect to the satisfaction of the debt to Clason, &c., from the bankrupt's estate, than of any difficult or important principles of law or equity. The latter, as far as they arose in the case, are sufficiently stated in the reporter's marginal note to the decision of the Court of Errors.

"Where a bill in Chancery is filed against two defendants jointly interested in the subject matter of the suit, and the bill is taken *pro confesso* against one of them for want of appearance, and the other party appears and disproves the plaintiff's case, the bill will be dismissed as to both defendants."

"C. and D. endorsed the note of S. as security to L., who sued P. on the note, and recovered judgment against him, and afterwards sued C. and D. as endorsers, and recov-

ered judgment against them. C. and D. paid the amount of the debt, and took an assignment of the judgment against S.

The Court of Errors held that C. and D. stood in the place of L., and might avail themselves of the judgment to recover the money paid by them, of S.'s estate, (by virtue of the lien of the judgment.) A surety who pays a debt for his principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed, to enforce payment against the principal debtor.

Decree reversed, 11 to 8.

TENANCY IN COMMON.

CUYLER v. BRADT, 2 C. C. E., 326.

Tenancy in Common; Notice to Vendee of Vendor's Title, by Recital of the Intent of the Purchase in deeds among the joint-purchasers.

APPEAL from decree of the chancellor. The main question in this case, was whether the estate of several patentees who had agreed to purchase jointly, and to bear in equal proportions the expense of obtaining a patent, which was to them *jointly*, was an estate in joint tenancy or in common.

The Chancellor held that the patentees took as joint tenants and not as tenants in common.

But the Court of Errors on appeal held, that it appearing by the recital of *deeds among themselves*, that they intended to purchase in common, each to have an *interest* in proportion to his share of joint contribution, they took not as joint-tenants, but as tenants in common.

And they also held that a *purchaser* who took a conveyance from the survivors of the patentees with knowledge of the recitals in those deeds among the patentees themselves, was a purchaser with notice of the title of the patentee who had died, to his share of the patent; although if, without

such notice, he had purchased for a valuable consideration, the conveyance would have transferred the legal title to him.

It was held, accordingly, that the grantee in this case took subject to trusts implied as well as expressed, and the Chancellor's decree was accordingly reversed.

¶ In *Coles v. Coles*, 15 J. R. 159, it was held by the Supreme Court that where real estate is held by partners for the purpose of the partnership, they hold not as partners but as tenants in common; and the rules relative to partnership property do not apply to it; that one partner can only sell his individual interest; and when both join in the sale and conveyance and one only receives the purchase money, the other may maintain an action against him for his proportion.

In *Baker v. Wheeler*, 8 Wend. 505, where two tenants in common were partners in the lumber business, and cut timber on the lands held in common to carry on their business, and one of them gave a license to a third person to cut timber on the same land, it was held good and that it conferred title to the timber cut by him especially where the license was in satisfaction of a demand due from both tenants in common.

In *Smith and another*, assignees of *M'Jimsey v. Jackson*, 2 Edw. Ch. Rep. 28, the Vice Chancellor of the first circuit held that where partners buy real estate with joint funds for partnership purposes, there is no right of survivorship in the lands. Upon the death of one partner intestate, his share descends to his heir. The Vice Chancellor even holds that equity cannot interfere to alter its character, except upon the ground of an *agreement*." He says:

"There are instances, however, of lands held for partnership purposes, which will be considered in equity as personal property, and be converted and applied accordingly. On this subject in the English Chancery there has been a diversity of opinion. Lord Thurlow held, in *Thornton v. Dixon*, 3 Bro. C. C. 199, (contrary to his first impression) that in order to warrant a conversion of the real estate which had been purchased and held for the purposes of the partnership, into personalty, upon the death of one of the partners, there should be an express agreement for the sale and change of the property; otherwise, upon the dissolution, the property

of the partnership would result, according to its nature—the real as real, and the personal as personal estate. Upon the authority of this case, Sir Wm. Grant decided in the cases of *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Id. 500, in favor of the representatives of the real estate; he being of opinion with Lord Thurlow, that the circumstance of purchasing real estate with partnership funds, and for the business of the partnership did not alter its nature or prevent its descent to the heir at law.”

“Lord Eldon is reported to have entertained different views on the subject; and, by his decisions in *Ripley v. Waterworth*, 7 Ves. 425, and *Townsend v. Devaynes*, reported in 1 *Montagu on Part.*, app. 97, especially by the last case, he appears to have decided that the freehold of premises, purchased by partners for the purpose of carrying on the business in which they were engaged, was on dissolution, by death or otherwise, to be considered as personal estate. These were cases in which the question arose between the representatives of the real and the personal estate, and wherein the rights of creditors were not immediately involved.”

The Vice-Chancellor further held that there was nothing in the case of *Coles v. Coles*, (*ante*), to prevent the Court of Chancery from giving effect to any express agreement which may be found to exist between partners, concerning their purchases of real estate, and that it was competent for them to change the character of such property. “But if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid for out of their joint fund, and to be used for partnership purposes, I am of opinion it must still be deemed real estate. The law will certainly so regard it; and equity cannot interfere to alter its character, except upon the ground of an agreement.” He cites in support of this principle, *M'Dermot v. Lawrence*, 7 Serg. & R. 438; *Goodwin v. Richardson*, 11 Mass. R. 469; *Ford v. Heron*, 4 Munf. 316; *Delossey v. Hutchinson*, 2 Rand. R. 183, and *Greene v. Greene*, 1 Ham. Rep. 244, (Ohio.)

In the case before him, where the partners bought in a house and lot upon a mortgage sale, to secure a debt due to their firm; and other real estate upon speculation, paying for it out of partnership funds, and debiting it to merchandise accounts, and also took up money upon mortgage of the property, which was put into the same account, and the parties having failed, and the surviving partner assigned all his interest in the real estate for the benefit of the partnership creditors,

The Vice Chancellor held, that the real estate was to be

considered as partnership property ; and the proceeds of it, liable to partnership debts and purposes ; also, that they were first to be applied to that use, before any part could be claimed by the administrator of the deceased partner, for the benefit of his separate creditors, or next of kin. The balance would belong to the heir at law.

He also held that the widow of the deceased partner was entitled to a right of dower in her husband's share, but having joined with her husband in the mortgages which were foreclosed, she had only a right of dower in the equity of redemption, which attached to the balance in court. That right of dower he held, might be estimated upon the principle of a life annuity ; and a gross sum could be paid over to her, or one third of the moiety of the fund, might be invested for her use, at her election. pp. 35, 36.

Upon this point of the claim of dower, the Vice Chancellor admits that "his conclusion may not seem to be reconcilable with the decision in the Ohio case of *Greene v. Greene*, where the court proceeded mainly upon the effect of the special agreement in the articles of partnership, and as to its effect in preventing any right of dower attaching to the land. If that decision can be supported upon principle, I apprehend it can only be done through the particular circumstances of the case. It is sufficient to say the facts in the present suit are different."

Now, the case of *Greene v. Greene and al.*, (1 Hammond's Ohio Rep. 244,) does certainly differ in one leading, if not controlling fact, from the case of *Smith v. Jackson*. That fact is, that the real estate in the former, was purchased as the report states : "as a site for their establishment as brass and iron founders, and buildings were erected, which were used and occupied exclusively for the purposes of the partnership, and were necessary for that use, and constituted a large portion of the capital invested." This feature is wholly wanting in the case of *Smith v. Jackson*, unless the buying in by the partners there, of one of the houses and lots to secure a debt due their firm, can be tortured into a purchase of premises for partnership purposes. As to the rest of their purchases, which were as it is expressed, "upon speculation ;" there can be no pretence for saying that they were for purposes of the partnership trade. But in the case of *Townsend v. Devaynes* before Lord Eldon, which seems to be especially relied on by the Vice Chancellor, the real

estate, "paper mills and premises," are expressly stated to have been purchased for the use of the partnership business in which the testator was engaged. There was no question there, as to the rights of partnership creditors, and though it is now a case of undoubted authority, it is difficult to discover how it has any application to the point decided by the V. C. in *Smith v. Jackson*, as to the lien of partnership creditors upon the proceeds in equity, of property not bought or used for any purpose of the partnership trade. (See note to 11 Simon's Rep. 498, where the case is fully stated.) The case of *Ripley v. Waterworth*, 7 Ves. 425, also decided by Lord Eldon, is of the same description. The property there was held and used for the purposes of the partnership trade.

But in the case of *Bell v. Phyn*, 7 Ves. 453, the property though bought with partnership funds, was not bought for the purpose of the partnership. It is true that the master of the rolls says that "even if it could be considered in a proper sense, partnership property, upon the authority of the case before Lord Thurlow, (*Thornton v. Dixon*, 3 Bro. C. C. 199,) I am obliged to decide for the heir." In all the cases where the English courts have held that real estate purchased with partnership funds, was to be considered as partnership property, it has been not only purchased, but used solely for the use of the trade, or held converted by express agreement. In the case of *Cookson v. Cookson*, 8 Sim. 543, the Vice Chancellor, Sir Launcelot Shadwell, expressly sanctions this view. He there said, (p. 547,) "But what strikes me as the law applicable to the case is this, namely—that law which Sir William Grant laid down in *Bell v. Phyn*. Suppose this was partnership property, I doubt whether there was a conversion. There was no occasion to call for it for any of the purposes of the partnership. It remains clear. Each might have entered into the enjoyment of his share. Then suppose all die, why is it to be considered personal property—something different from what it really is, as between the real and personal representatives?" So it appears to me in this case; when the partnership terminated, it is not suggested that there was any necessity for a sale of a particle of the assets for the purpose of paying the

partnership debts. The consequence therefore is, that freehold property will remain freehold in the different parties." 8 Sim. 543.

The case of *Greene v. Greene*, being a case, therefore, of the sort, where the English courts have held real property converted to personal, even without any express agreement that it should be considered as part of the partnership property if it was purchased with partnership funds and used for the purposes of the partnership trade, the claim of dower could not be sustained, until the debts of the partnership were first paid. The idea of the Vice Chancellor, then, in *Smith v. Jackson*, that the court, in *Greene v. Greene*, proceeded mainly upon the special agreement in the articles of partnership, does not seem warranted by the facts in the case. There was no need of any special agreement to constitute it partnership property, if it was bought and used for partnership purposes. Nor is it easy to perceive, even if they did rely mainly on the special agreement, how that alone would distinguish it from the case of *Smith v. Jackson*, if the Vice Chancellor was right there in his conclusion, that there was "sufficient evidence from the entries in the partnership books, and from other circumstances, that the partners must have understood and intended the purchases to have been held as partnership property." (p. 35.) These understandings and intentions of the parties, he holds to be sufficient to determine the character of the property; and that being once determined, his decision in favor of the right of dower in the partnership property, seems not only irreconcilable with the principle of the decision in *Greene v. Greene*, but equally hostile to the principle of his own decision in *Smith v. Jackson*. If the character of partnership property rightly attached to it, he takes it for granted, that it is liable for the partnership debts, in the first instance; though, if merely bought with partnership funds, without anything further, it may be doubtful whether any such preference is either upon principle or authority sufficiently established. But being held liable in this case, upon sufficient evidence of the intent of the parties, for the partnership debts, it must surely remain so, not only as to the administrator and next of kin of the deceased partner, but as to the dower also, until those

debts are satisfied. Both parts of this decision can not stand together, upon the Vice Chancellor's own principles, without the aid of some clearer distinction than that he suggests with regard to the ground on which the court in *Greene v. Greene*, mainly proceeded.

The general question, as to the character of real estate purchased by two partners with the funds and for the business of the partnership, where one of them died leaving the firm without personal property sufficient to pay its debts, came up in the case of *Delmonico v. Guillaume*, before Assistant V. C. Sanford, 2 Sandf. R. 366. He there held that such real estate was in equity to be treated as personal property; and that the surviving partner had an absolute right to dispose of it as such for the payment of the partnership debts. Upon this ground, without even the personal representative of the deceased partner having been made a party to the bill and without, of course, any regular or binding account of the debts and assets of the firm, he decreed that the surviving partner had full right to sell the real estate and compelled the purchaser of the property, who objected to the title, on a bill for a specific performance by the surviving partner, to complete his purchase. The widow and infant heir of the deceased partner were made parties defendant along with the purchaser; but the personal estate was not represented, as expressly appears from the decision of the Vice-Chancellor. The guardian *ad litem* of the infant heir was ordered to join in the conveyance in the name of the infant.

The Assistant Vice Chancellor, in the course of his brief opinion, observes:

"The case of *Coles v. Coles*, 15 J. R. 159 was at law. In *Smith v. Jackson*, the Vice Chancellor concurred in the doctrine of the cases before cited, to its extent as applicable to creditors." (*Qu.* as to the right of dower?) "Indeed, the cases of *Phillips v. Phillips*, 1 Mylne & Keen, 649, and *Broom v. Broom*, 3 Id. 443, go so far as to hold that this farm would be deemed personalty as between the real and personal representatives. If that doctrine were applied here, the personal representative would be a necessary party to this suit. I will not express an opinion upon the point adjudged in those cases." 2 Sand. R. 368.

This language of V. Ch. Sandford would seem to intimate a doubt whether he would go so far as to hold, with Sir John Leach, the master of the rolls, in *Phillips v. Phillips*, and *Broom v. Broom*, that this farm was to be deemed personalty as between the real and personal representative, in case of *intestacy*, as was the case before that court. Whether such real estate may not pass under a devise or bequest of all the testator's *stock in trade*, is a different question. But if the Vice Chancellor was right in considering it as *personal* as well as partnership property, to be devoted to the uses of the partnership in the payment of debts, and so he expressly says: (p. 367,) it is not easy to see how the making of the personal representative a party to the suit can, upon principle, be dispensed with. In the case of *Broom v. Broom*, the personal representative of the deceased partner filed the bill against the infant heir and the assignees of the surviving partner who had become bankrupt, to have the sale made to the latter confirmed, and to have it declared that the share of the infant heir became personal assets to be administered by the administratrix. All parties were then before the court: the *administratrix* there had sold the share of her deceased husband before the bankruptcy, but the purchase money was not paid. So far, therefore, as the case of *Broom v. Broom* goes, it not only goes to show that the personal representative was a necessary party to the suit, but had also in equity the sole right of disposing of the property. It was not in that case necessary, for the payment of partnership debts, it is true, that the property should be disposed of; but if it had been, surely it is the business and peculiar duty of the personal representative to see that such is the case, and to take care that nothing of the estate which ought to go to the individual creditors or next of kin, is misapplied to the payment of partnership debts; when there might be sufficient assets without the sale of the real estate. But granting that there was not enough of the partnership assets to pay its debts, yet if there was more than enough of the individual personal assets of the deceased partner, is not the personal representative of the deceased partner entitled to elect whether that share of the debt shall be paid out of the one fund or the other; or, in other words, to *redeem* the pro-

party from the lien of the partnership debts? Or suppose, the heir at law being of full age, had elected to consider it real estate and most for his benefit to pay his ancestor's share of the debts of the partnership; he being also the only next of kin and entitled to the whole surplus, can there be a doubt that he might compel the personal representatives to redeem the land? And would it not then be, in the hands of the heir, real estate to every possible intent? or must it remain personal estate forever? In every point of view, therefore, it would seem that the personal representative of the deceased partner, if the right of selling did not belong to him, was a necessary party to this suit. The dissolution of the partnership by the death of a copartner, vested the actual legal as well as equitable interest in him, subject to the payment of the partnership debts; and when the aid of a Court of Chancery was invoked to make a perfect title to a purchaser of that interest, through a sale made by the surviving partner, the court should have had all parties before it who could claim it either as real or personal. The V. C. says indeed that "The surviving partner will be required to account for this property as a part of the assets of the copartnership:" but account to whom? If to the personal representative of the deceased partner, that alone proves that he ought to have been a party. In short, it would seem that the proper frame of the complainant's bill in this case would have been a bill against the personal representative as well as the heir at law for a sale, of the property to pay the partnership debts: upon an account taken of its assets and liabilities; or to pay their proportion of the debts out of other assets of the testator. Of his right to sell at all the share of his partner, and to enforce such a sale against the heir at law and the purchaser, by a bill for specific performance, we must be pardoned for entertaining doubts until further adjudications shall dispel them.

The case of *Phillips v. Phillips* goes to the extreme verge of the doctrine of transforming real estate held by partners into personalty, and is, in a great degree contradicted, as to the character of it, where it is a question between the real and personal representative, by the later and better considered decision of Sir William Grant, in *Cookson v. Cookson*, 8 Sim. R. 543, before cited. He held that "all the

debts of the partnership being paid, the share of the deceased partner in such real estate, retained its original character and descended to the heir." And when the partnership purposes are served, as personalty, why should it not result to its real character? Why, as Sir William Grant there asks, should it be considered as something different from what it really is, as between the real and personal representatives?

The case of *Houghton v. Houghton*, 11 Simon, 491, is not in conflict with these principles. The Vice Chancellor Sir L. Shadwell, there expressly says that that case was not decided upon that of *Phillips v. Phillips*, though the marginal note would make it appear so. He says: "Now I confess that I do not think that this case stands on the proposition which was stated so very plainly and broadly by Sir John Leach in the case of *Phillips v. Phillips*; but the question before me is this; whether I have not sufficient evidence of the dealing between *James* and *John* with regard to this real estate (in which, as real estate, *James* then had the sole interest) to show that *James* consented, as regarded *John*, that it should be treated as partnership property; and my opinion is that the evidence does amount to that." In addition to this consent, the property had also been purchased with partnership funds, and used for partnership purposes.

Chancellor Kent in the note (c) 3 Kent's Com. 39, thus lays down the rule as settled in England; "The general principle now declared in the English law is, that real estate acquired for the purposes of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership." He even states the doctrine in *Phillips v. Phillips* without qualification. But he dissents from the decision in *Smith v. Jackson* on both points, quite as strongly as we have ventured to do on the mere point of dower. He says: "The Vice Chancellor in New York in *Smith v. Jackson*, 2 Sd. R. 28, reviews all the conflicting cases on this point; and he follows the Supreme Court of New York and holds, that though real estate be purchased with partnership funds for *partnership purposes*,* there is no survivorship as to the real estate, and the

* *Quære?* If the property there was purchased within the proper meaning of the terms—for partnership purposes?

share of a deceased partner as a tenant in common descends to his heirs, unless there be an agreement among the partners, that the lands so purchased shall be considered as personal property; and that there, upon the foot of that agreement and not without it, equity would apply the lands to pay partnership debts. Nay, he gives the wife her dower in the partnership share so descended. The decisions on this side of the question, appear to me to be a sacrifice of a principle of policy, and above all, a principle of justice, to a technical rule of doubtful authority." (This note of Ch. Kent contains a summary notice of cases on the appropriation of partnership lands to partnership debts, in preference to others, in several states of the Union, and he says: "The prevalence and correctness of the preference appear to be incontestable.")

In fine, upon principle and the better authorities, it may be doubted whether the proposition laid down by Sir Wm. Grant in *Cookson v. Cookson*, upon this point is not carrying the doctrine of considering real estate of a partnership, personal assets, as far as it can properly be so considered. By express agreement, or even acts of the parties, lands bought by the partnership though not for strict partnership purposes, may be made partnership assets; and land, bought with their joint funds, for the purposes of their trade, become assets of the firm, without any such agreement. But when those purposes have ceased, by the termination of the firm; upon the liquidation and payment of its debts, out of other assets, what rule of justice, of equity, or of policy can there be, that hinders the real estate from resuming its true character, with all the legal incidents?

TRUSTS AND TRUSTEES.

FURMAN, appellant, v. COE, respondent, 1 C. C. E. 96.

Liability of Trustee or Executor who has been robbed of Trust Money.

THE Court of Errors held in this case that it sufficiently appeared from the evidence that the executor of a testator, had, in his lifetime, been robbed of a certain sum of trust money received by him, and that his personal representative might, after his death, avail himself of the fact, in excuse, though uncorroborated by the oath of the party.

The decree of the Chancellor was on this ground, *reversed*.

MUNRO v. ALLAIRE, 2 C. C. E. 183.

Trustee purchasing from his cestui que trust; Specific Performance.

IN this case, a purchase had been made of certain real estate by an executor who had power to sell for the benefit of a third person, from the *cestui que trust*. Under the circumstances of this case, the Chancellor held it no objection on a bill filed by the executor for a specific performance and other purposes, to a decree for specific performance. But on appeal,

The Court of Errors held, that such purchases by a trustee of his *cestui que trust*, are not favored in equity, and that he can not maintain a bill for a specific performance of such a contract.

The decree of the Chancellor was accordingly *reversed*.

FISHER and others, appellants, v. JOSEPH C. FIELD, respondent, 10 J. R. 495.

Assignment of Equitable Interest ; Declaration of Trust.

THE appellants filed their bill in the court below, stating the following case. Letters patent were issued to B. Griffen, a soldier in the New York line, for a certain lot in the military tract, town of Aurelius. On the 24th of March, G., for a valuable consideration, sold his right to military lands, and made an assignment thereof to John Bird, on the back of the discharge, given to him by the commander in chief. In February, 1752, Bird sold and assigned the right to B. Fisher, John and G. Fisher. Under the act of the legislature, of January 8, 1793, and 27th March, 1794, these assignments were deposited and registered, on the 1st of September, 1794, according to law. The respondent having set up some claim to the lot, a hearing was had before the Onondaga commissioners. The respondent claimed under a conveyance from B. Griffen for the lot in question, dated March 15th, 1794. But the commissioners being of opinion that this deed to the respondent was in fraud of the prior right of the appellants, who had sued out a patent for the lot to Griffen, in July, 1792, which was minuted in the office of the Secretary of State, were of opinion that Fields took the lot subject to the rights of the appellants, and awarded the lot to the respondent in trust for the appellants. The bill prayed :

1. That the respondent might be decreed to convey the premises to them.

2. That the respondent be restrained from proceeding further at law against the tenants of the appellants, and for general relief.

The following instrument was proved to have been executed to Bird, when he sold his right to military lands to Bird :

"This is to certify that the bearer hereof, John Bird, is entitled to all the lands that I Benjamin Griffen, am entitled to either from the state or continent for my services as a soldier, certified in my discharge."

24th of March, 1784, signed and sealed by G.

The delivery of the discharge with this certificate endorsed thereon, was proved, and that Bird paid him 15 or 16 dollars, the usual price for soldier's right to military lands. It was also proved that in 1794, when Griffen executed the deed to Fields, the latter enquired if he had ever sold his right to lands, and G., answered he had not, but had signed a paper respecting it to some other person whom he did not name. Fields did not ask for the discharge, nor was any produced. Some money and goods were at the time paid by Fields, the purchaser, to G., but how much did not appear.

On the hearing of the cause, the Chancellor Lansing dismissed the appellant's bill with costs, on the ground that the certificate of G., in the transfer of his discharge to Bird, was neither good as a grant; nor as a contract under the statute of frauds. He held that the certificate was a nullity as a conveyance, no consideration being expressed in it, and no words legally competent to convey an interest in lands, having been made use of. Neither was it good as a contract, for it does not specify any terms of an agreement, nor express any consideration; that the consideration is a part of the agreement, and the whole agreement must be set forth; and cites *Wain v. Walters*, 5 East, 10, as the true rule, and as equally binding in law and equity. On appeal,

The Court of Errors held, Kent, Chief Justice, delivering the opinion of the court, that as G., at the time of the transfer to B., by the certificate, had only an equitable interest, that the certificate was an assignment of that right, and transferred his whole interest, and was sufficient for that purpose, without any words of inheritance or consideration expressed in the instrument. That it amounted to a *declaration of trust*, and was a sufficient authority to B., to procure a patent in his own name, had not the statute directed it to be issued in the name of the soldier; and that after the

patent, G., took it as a trustee to B., who had the equitable interest; especially as the act of April 6, 1790, provided, that previous sales and dispositions of the lands made by soldiers should be valid, and the patent having a retrospective effect must be deemed to have vested the lands in the patentee and his heirs from the 17th of March, 1783; that no particular form of words was requisite to create a trust.

The defendant Fields purchased of Griffen, knowing of the assignment, and therefore he was a purchaser, chargeable with the trust, and as much bound to execute the trust, as the soldier himself. Per Kent, C. J., p. 506.

This being the unanimous opinion of the court, the decree below was ordered to be *reversed*, and that a decree be made that the respondent be decreed to convey the land to the appellants, and be enjoined, &c., according to the prayer of the bill.

LORILLARD *v.* COSTER, 14 Wend. 255, 399.

In Ch., 5 Paige, 172, 234.

Trust estate for twelve lives, with remainders over; Perpetuity; Trust to receive and pay over under sec. 55th of Statute of Trusts.

APPEAL from a decree of the Chancellor.

The bill in this case was filed by the executors of the testator for the purpose of settling the construction of the will and codicil of George Lorillard, of the city of New York, who died in September, 1832, a bachelor, leaving real and personal estate worth about three millions of dollars; most of which was in real estate in the city of New York. His mother survived him but a few days. He left two brothers of the whole blood, Jacob and Peter; one brother and sister of the half blood; a niece, Mrs. Bartow, daughter of a deceased brother, Blaze Lorillard, and two grand-nephews, George and Blaze Lorillard, sons of a deceased son of his brother Blaze. Upon the death of his mother, the persons enumerated were the only heirs-at-law.

By his will, made in October, 1831, he appointed his brother Jacob, and twelve of his nephews and nieces of the whole blood, children of his brother Jacob, Peter and Blaze, trustees and executors, and devised to them as such, as joint tenants, and not as tenants in common, all his real and personal estate, in trust, for the uses and purposes declared in his will ; they were as follows :

First, as to his real estate in the city of New York, to lease the same from time to time, and to receive the rents and profits thereof ; and out of such rents and profits to pay sundry legacies, and annuities there bequeathed ; and to account for, *pay over, and divide* the residue of such rents and profits, after deducting expenses and disbursements, to and among the twelve nephews and nieces who were named as executors and trustees in the will, and who were the only children of his brothers of the whole blood, during their natural lives ; and to the survivor or survivors of them, *to be divided equally between them or such of them as should from time to time be living, share and share alike.*" The shares of the nieces and grand-nieces to be paid to them for their separate use and benefit free from the control or liabilities of their husbands.

Secondly, to convert all the residue of his real and personal estate into money, within three years after his death, and invest the same in the purchase of real estate in the city of New York ; and the clear rents and profits of it to be paid and divided by the executors and trustees to and among all the children of his three brothers, and the survivor or survivors of such children during their natural lives, to be equally divided among them, share and share alike, and with the same proviso as in the preceding clause. He also declared it to be his will and desire, that his said nephews and nieces should not alienate, sell, or transfer their shares of such rents and profits, or any part thereof, without the written consent of a majority of his executors and trustees ; that majority not to be less than three persons.

Thirdly, The will directed, that after the death of all his said nephews, all his estate then remaining should be equally divided among all the children of such nephews and nieces, and the surviving children of such of them as

might be dead, in equal proportions, *per stirpes*, and not *per capita*—special directions being given in the will as to the distribution; which was not to be made until two years after the death of all his said nephews and nieces.

Fourthly, The testator provided that not less than *three* of his executors and trustees might execute the trust: also, if reduced to less than five by death or disability, the number should, from time to time, be increased to seven. Such new trustees were to receive 1-16th of the net income of the estate, during the time they acted as such, in lieu of their annuity.

By a codicil, made in December, 1831, he devised in fee to his nephew, P. L., jun., son of his brother Peter, a moiety of various parcels of real estate, and also a house and leasehold lot of ground in the city of New York, upon condition that he within two years after the testator's decease, pay to his executors and trustees \$25,000, to be invested by them in trust for the uses and purposes declared in the second article of his will; and upon the further condition that he should agree to pay \$200, as an annuity to B. M. jr., for 10 years after the death of the testator: if these conditions were not accepted, the devise to be void, and the property to be sold, and proceeds applied as directed in the second article of the will. By the same codicil, he gave a life estate in a certain farm to a grand-nephew G. L.; also another life estate in another farm to another grand-nephew, B. L.; and a life estate in two other farms to his niece, Mrs. Barton; directing that after such life estates, the trustees should sell the property and invest the proceeds as provided in the second article. He also gave annuities to the children of his half brother during their lives or until the death of all the children of his three brothers, B., P. and J. L., to be paid out of the fund created for the payment of annuities.

The will and codicil were proved, and letters testamentary issued to some of the nephews and nieces named in the will as executors and trustees. Catharine Holsman, the mother of the testator, made a will of her personal estate, previous to her death, and appointed her sons George and Jacob, and J. G. Coster, executors; the two latter of whom took upon them the execution of the will.

The bill was filed by Jacob Lorillard, one of the executors;

and trustees named in the will of his brothers ; and the seven nephews and nieces who first took out letters testamentary on the will of George Lorillard, together with the husbands of such of the nieces as were married ; for the purpose of settling the construction of the will, and to have such of the trusts as were valid, carried into effect under the direction of the court. Mrs. Bartow and her husband, she having refused to join in the suit, and the four executors and trustees, who were minors were, with the other heirs at law, made defendants.

They in their answers insisted, that the devises and bequests were illegal, except some of the specific devises and bequests contained in the codicil ; and they claimed to have the residue of the estate distributed as in case of intestacy. The rights of the infant defendants were submitted to the decree of the court.

The cause was first heard before the Vice Chancellor of the first circuit, (McCoun,) who decreed in favor of the validity of all the trusts contained in the first and second articles of the will.

The Vice Chancellor arrived at these conclusions ; (See his opinion, 5 Paige, 179 :)

1. That the trusts of the second as well as of the first article were valid at common law.
2. That the trusts declared in the first article of the will were not an infringement of the common law rule as to perpetuities ; he cites the case of *Bengough v. Eldridge*, (1 Sim. Rep. 173,) where the inheritance was suspended during the life of 28 persons ; and the trusts to be performed after their decease, were held valid by Sir John Leach, V. C. This decree was affirmed in the House of Lords, where it was established that a limitation by way of executory devise, not to take effect until after the determination of those lives, and a term of 21 years, as a term in gross, and without reference to the infancy of any person, is a valid limitation." (Reported under the title of *Cadell v. Palmer*, in the House of Lords, 1 Clark and Finn, 372.*

* It was held in the House of Lords, by all the judges in this case, that if to the term in gross of 21 years, be added the number of months equal to the

3. As to the trusts declared in the second article of the will, the Vice Chancellor held that by the expressions there used: "That after the death of all my said nephews and nieces, all my estate then remaining shall be equally divided among all the children of my said nephews and nieces," the testator intended exclusively those nephews and nieces, mentioned in the first article of his will, to whom he had given life estates, and that it did not extend to after born children of his brothers, if any should be born; that the life estates, therefore, given to those nephews and nieces by the second article, being confined to those nephews and nieces who were then living, the period for the limitation over to take effect, did not exceed the common law rule. But even if the other construction prevailed, that then by well settled rules of law, it would not let in children born after the death of the testator.

4. The Vice Chancellor held that the trusts in both the first and second articles of the will, in favor of the nephews and nieces were also valid, under the provisions of the Rev. Stat. of 1830, relative to trusts and the suspension of the power of alienation. That the trusts as to their nature and purpose, were within the terms of the 3d clause of the 55th section, which provides, that express trusts may be created, 3. "To receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title." He did not advert to the question since made, whether the trust as expressed in this will, "to pay over and divide the rents and profits," was equivalent to, and could be supported as a trust to "apply to the use" of the *cestui que trust*. As to the number of the *cestuis que trust*, he maintains that none of the provisions of the Rev. Stat. have declared that a trust shall not be created for the

longest or to the ordinary period of gestation, the limitation would be void. Mr. Baron Bayley, who delivered the opinion of the judges, says: "The unanimous opinion of the judges is, that such a limitation would be void, and too remote. They consider 21 years as the limit, and the period of gestation to be allowed only in those cases where the gestation actually exists."

benefit of more than a limited number of persons in being at the time or during the lives of any particular number. The 14th and 15th sections of the article "Of the Creation and Division of Estates,"* he holds, apply only to future estates. "They do not affect estates in possession or those where an immediate right of possession is conferred. It is still competent by deed or will to create an estate to take effect immediately in possession, in favor of any number of persons in being, as joint tenants for their lives, and for the life of the survivor; because, however numerous they may be, they have only to unite with the remainder-man or reversioner, and convey the whole estate in fee."

"But it is said, that devising the legal estate to trustees for the use of so many persons during life, is of itself an infringement of the rule, and invalidates the whole trust, because the trustees are not at liberty to convey; and *cestuis que trust* have no estate or interest in the lands which they can join in conveying, so long as any one of the twelve shall live; and consequently that the power of alienation is in suspense for a greater length of time than the lives of two persons in being." In answer to this objection, the Vice Chancellor says: "Except in contravention of the trust, I

* § 14. "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

§ 15. The absolute power of alienation, shall not be suspended by any condition or limitation whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section.

§ 16, provides that a contingent remainder in fee may be limited on a prior remainder in fee, to take effect if the person to whom the first is limited, die before attaining 21, or upon any other contingency which determines the first estate before the person to whom it is limited obtains full age.

§ 17. "Successive estates for life shall not be limited unless to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect in the same manner as if no other life estates had been created. 1 Rev. Stat. 718. (2d Ed.)

no where find a trustee in whom the legal estate is vested, prohibited from conveying."

5. The question as to the limitation over at the death of the twelve nephews and nieces, the Vice Chancellor says, the counsel for the complainants have purposely avoided discussing, but that the defendants have urged the point as one necessarily involved in the decision ; because if that part is void, the whole is vitiated. "That consequence in my judgment does not follow. Even if void, I am decidedly of opinion that all the prior trusts are to be executed." *Beard v. Westcott*, 5 Barn. and Ald. 807 ; and 1 Turn. and Russ. 25. If the defendants wished a decree setting aside or declaring void the remainder over, they should have filed a cross bill, as was done in *Thelluson v. Woodford*. It has been objected that there are not parties in *esse* to enable the court to make a decree." This the Vice Chancellor declined to determine, but expressed his opinion that the future estate thus created was void.

6. Nothing was said in his opinion or decree, as to the validity of the provision giving the one-sixteenth of the income to the grand-nephews and nieces, who might be selected as new trustees : nor as to the validity of an accumulation directed by the will of one-half of the share of Mrs. Bartow, in the rents and profits, and of the whole of J. L. jr.'s share for seven years, as provided in the codicil.

From this decree, all the defendants, except Peter Lorillard, the brother, and the four minor executors and trustees, appealed to the Chancellor.

The Chancellor held :

I. "That this was a case in which the heirs at law of the testator, who insisted upon the invalidity of the whole trusts as to the rents and profits, and as to the ultimate limitation over to the children and grand children of the twelve nephews and nieces, had a right to ask for a decision of the court as to the validity of these several limitations, before the trustees could be considered as authorized to execute the power in trust in relation to investing the personal estate, and the proceeds of the real estate out of the city of New York. That investment can be authorized by the court on-

ly so far as the trusts are legal and proper. And if the limitation over to the children and grand children of the twelve nephews and nieces, or any part of the previous trust, is void, then the investment must be made in such a manner as to secure the rights of those entitled to what is not well devised. So far as is necessary to settle the rights of the appellants, the executors and trustees must be considered as the legal representatives of the rights of persons not yet in *esse*, who could not, of course, be brought before the court as parties, and it is not the fault of the appellants that the grand-nephews and nieces of the testator, who were in existence at the commencement of this suit, were not made parties thereto.* If the question as to the want of proper parties had been suggested before the Vice Chancellor, it would have been the correct course to let the cause stand over, with leave to the complainants to amend their bill, so as to bring all necessary parties before the court. But as neither party raised the objection there, it was competent for the court to go on and settle the rights of the parties then before it; which decree is of course without prejudice to the rights of those who are not before the court as parties, and who were entitled to be made parties before a decree could

* But in *Nodine v. Greenfield*, 7 Paige, 544, upon a bill of foreclosure, where the widow of the mortgagor took a life estate in the premises and the children of his brother then in *esse* took vested remainders in fee, as tenants in common therein, subject to open and let in after born children; and subject to be divested by death during the life time of the widow, or to be defeated by the execution of a power of sale by the executors or the survivor of them, the Chancellor held that the children in *esse* at the time of filing the bill of foreclosure, having the first estate of inheritance in the mortgaged premises were necessary parties, and not having been made so, neither they nor the children born subsequently, were bound by the decree. In *Kimber v. Ensforth*, 1 Hare 293, and in *Hawkins v. Hawkins*, 1 id. 543, which were suits for the execution of a trust to sell real estate, &c., Vice Chancellor Wigram, refused to proceed on account of a defect of parties. There the personal representatives of the persons creating the trust were not before the court. In the case of *Baker v. Harwood*, 1 id. 327, which was a suit to administer an estate, he also refused to proceed, and ordered a reference to ascertain the parties interested.

be made against them definitively settling their contingent rights."

II. The Chancellor then declares that he agrees with the Vice Chancellor, that from the whole of this will taken together, the testator intended that the rents and profits of the real property directed to be purchased in the city of New York, should be divided among the twelve children of his brothers and sisters of the whole blood. "The principle of construction adverted to by the Vice Chancellor in his opinion in this case, is therefore correct as applied to the second section of the will. And a devise of the rents and profits to all the children of the three brothers as a class, would not include those who were not in *esse* at the death of the testator. (See Bro. C. C. 404, note a.) There is therefore no difference in the general devise of the rents and profits of the city property, of which the testator died seised, and those of the real estate directed to be purchased: or as to the ultimate limitation over after the death of the twelve nephews and nieces." He then comes to the first of the questions, on which he differs from the Vice Chancellor.

III. "The validity of the general trust in favor of the twelve nephews and nieces of the whole blood of the testator, depends upon the construction to be given to the 15th section of the title of the Rev. Stat., relative to the nature and qualities of estates in real property and the alienation thereof, in connection with other provisions of the same title, particularly in §§ 36, 53, and 63.

I may here remark that these sections, as well as the 15th, as it now stands, are alterations of the common law rules as to estates and interests in real property. And no reasonable doubt can be entertained that all the devises and bequests contained in this will and codicil, including the ultimate limitations over to the grand-nephews and nieces and their children, would have been valid previous to the Revised Statutes. (See *Cadell v. Palmer*, 1 Clark & Finn. R. 372.) As the law then stood, however, although the ultimate remainder in the property would have been inalienable until the expiration of two years after the death of the twelve nephews and nieces, the intermediate estate would not have been rendered absolutely inalienable pre-

vious to the Revised Statutes. The only way in which a conveyance of an absolute fee could be prevented was by the limitation of a future or contingent estate, in favor of a person not in *esse*, or not ascertained at the time of its creation. This of course would not affect or suspend the alienation of a present interest given to another person. And the legislature have done very little towards the improvement of the law in this respect, if they have enabled the owner of a large estate to give a present vested interest therein, which shall be absolutely inalienable during any number of lives in being at the creation of such interest; and have only removed obstructions which might have heretofore prevented the conveyance of future and contingent interests."

The Chancellor then urges upon various considerations, and among others, the *intentions* of the revisers, as manifested in their report; all of which are open to much criticism; "That neither the revisers nor the legislature have made such a mistake in the recent revision of the laws; and that the provisions of the 15th section were sufficiently broad and extensive to embrace every kind of estate, whether present or future, by which the power of alienation might be suspended beyond two lives."

IV. But the Chancellor further held, that if the 15th section related only to a suspension of the power of alienation by the creation of *future* estates, the trusts were still void, by the 36th section, which declares that dispositions of the rents and profits of lands, to *accrue* and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in that article, in relation to future estates in lands. (1 Rev. Stat. 725.)* The third subdivision of the 55th section, subjecting trusts of rents and profits, to all the rules previously prescribed in the first article, he holds had the effect to render that trust in this will invalid. The tes-

* Section 36. "Dispositions of the rents and profits of lands to accrue, and be received at any time subsequent to the execution of the instrument creating such disposition shall be governed by the rules established in this article, in relation to future estates in lands." (2 R. S. 720; 2d Ed.)

tator could make no disposition of his property or of the rents and profits, through trustees or otherwise, that would render the property inalienable during the lives of these twelve nephews and nieces, (p. 224.) And if the interest of the nephews and nieces in the rents and profits, is to be considered as of the nature of a joint tenancy, so as to prevent a partage of the property, and to render the whole inalienable until these twelve persons are all dead, he declares the whole trust in their favor void.

V. He then proceeds to examine the question which was not raised before the Vice-Chancellor, whether the interests of the twelve nephews and nieces in the rents and profits, is to be considered as of the nature of a joint-tenancy, or only as a tenancy in common with cross-remainders.—(p. 226.)

Upon this point, after stating that “where *all* the purposes of the trust as to *any share* of the trust property are illegal or cease, the estate of the trustees ceases also; and they then become tenants in common with the owner of that share, though as to the residue they remain joint tenants,”—1 R. S. 727, § 44 and § 67,—he says; that he is “not aware that it was ever seriously doubted, that where a part only of the trusts of a will were contrary to the rules of law, the intention of the testator could still be carried into effect, so far as consistent with legal rules, where it was possible to separate the legal from the illegal part of the trusts.”

“If this testator, by his will, had made separate or distinct devises of the several undivided 1-12th parts of his estate to his nephews and nieces respectively, giving the rents and profits of each to them for life,” then he admits that their interest in the rents and profits of their several shares must be in the nature of several tenancies in common, and not of joint tenants; although the legal estate was in the trustees, as well as the right to receive the rents and profits. And upon the death of one of the nephews or nieces, the legal estate in the hands of the trustees would cease as to that share, and *the heirs at law of the testator* would become tenants in common with the trustees. Such a disposition he does not deny, would be valid, as it would apply to each of the other shares of the nephews and nieces. But he

holds that, by this will, this is not the nature of their estates, —p. 229.)

VI. He says, "The conclusion at which I have arrived is, that their interest is in the nature of a tenancy in common for life, with cross-remainders; and that such cross-remainders, so far as they are inconsistent with the 17th section of the statute, which prohibits the creation of more than two successive estates for life, *are void*. It is evident also, that the first cross-remainders which are limited upon the life estate of each, in his or her original share, as tenant in common, are contingent interests, in the nature of future contingent estates; and such interests being inalienable, by the 63rd section of the statute,* even after they shall become vested in possession,—their respective original shares out of which they arise, are rendered inalienable for one life before the cross-remainders can vest in possession, and also during one other life after the cross-remainders shall have vested. All the cross-remainders, except those limited to take effect upon the termination of the life estate of the nephew or niece who shall happen to die first, must necessarily suspend the power of alienation of portions of the estate for a longer period than the lives of two persons in being at the time of the testator's death; and upon which lives the cross-remainders are, by the will of the testator, made to depend. Each of the twelve nephews and nieces had upon the death of the testator, a vested but an inalienable life estate in 1-12th share of the rents and profits devised. "Where, therefore, the owner of any original share dies subsequently to the death of any one of the other eleven who now has a contingent remainder limited upon the original life estate in such share, the alienation of that share will have been suspended for two lives in being at the creation of the estate." To the extent of that share, the Chan-

* Section 63. No person beneficially interested in a trust for the receipt of the rents and profits of lands can assign, or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable. (1 Rev. Stat. 724; 2d Ed.)

cellor holds the cross-remainders to the eleven survivors valid under the 15th section of the statute; the other eleven cross-remainders, between the survivors, he held void. The life estates he held to be valid.

VII. The limitation of the *sixteenth* to the new trustees, upon the same principles, as it was limited not to take effect until the number of the original trustees was reduced to *four*, he also held too remote and void.

From various branches of the decree entered under this decision, seven separate appeals were taken: the complainants, as well as six classes of the defendants having appealed. It is quite unnecessary to specify the different grounds of the appeals in detail; as the decision of the Court of Errors upon the two main points in controversy, to wit: the trusts for the twelve nephews and nieces in the 1st and 2d articles of the will, and the ultimate remainder to their children in fee; disposed in effect of all the other grounds of appeal of the different parties. After the case had been argued elaborately by the counsel for the seven sets of appellants, opinions were delivered by Savage, Ch. J., Nelson, J., and senators Maison, Young and Tracy, all, in favor, though on somewhat different grounds, of reversing the decree of the Chancellor. We shall give the conclusions of Ch. J. Savage upon the different questions made by him; afterwards noting where they are dissented from in any essential particular, in the opinions of the other members of the court.

The Chief Justice, in considering the case, as it was affected by the Revised Statutes, took three views of it:

I. The effect of the statute, *supposing* the trust to be embraced under the 3d subdivision of the 55th section.

II. Whether it is a trust under the 55th section at all.

III. If not embraced in the 55th section, whether the trust is valid as a power in trust. p. 297.

I. As to the effect of the statute, supposing the trust within the 3d subdivision of the 55th section, he held:

1. That if it be conceded that the trust in favor of the twelve nephews and nieces is authorized at all, for any time, by the 3d subdivision of Sect. 55th, the estate is rendered in-

alienable by the devise to the trustees, which by the devise itself necessarily continues during the continuance of twelve lives. p. 327—32.

2. That the absolute power of alienation is also suspended by the creation of the remainder in favor of the grand nephews and nieces, which by the terms of the will is not to vest until two years after the death of the survivor of the nephews and nieces.

3. That the remainder thus created is *void*; but that the estate in the trustees if authorized by law, is not void; but that it would in that case be the duty of the court so to construe it as to sustain the trust during the continuance of the lives of *two* of the twelve nephews and nieces, by the application of the rule of approximation, or the doctrine of *cy pres*, which doctrine he considers as incorporated into the Revised Statutes.

4. That the right of the twelve nephews and nieces to "*enforce their trust in Chancery*" ought not to be likened to a legal or equitable estate: that their interest is inalienable; but if otherwise, the *estate* itself would not be alienable; that the idea of *cross-remainders*, in the right which the twelve nephews and nieces have to enforce the trust in equity, has no real existence, but is entirely fanciful.

5. But, if real and they could be deemed to hold such estates, the devise to the trustees being expressly an estate in joint-tenancy, cannot be construed a separate devise or rather twelve separate devises, one in favor of each of the twelve; and that if their interest is to be assimilated to an estate in lands, it must be subject to the restrictions upon future estates; and having the effect to suspend the alienation of the estate for a longer period than allowed by law, it was void in its creation, and consequently that the trust being at an end, the trust estate itself is at an end.

II. Whether it is a *trust* under the 55th section at all? p. 328, he held,

1. That under the 3d subdivision of the 55th section of the statute, the *object* of the trust in the devise in question is not such as is sanctioned by the Revised Statutes; that the words there used, "*apply to the use of*" do not mean "*to pay over,*" and consequently that the trust itself is void

in its *purpose*; that the trusts authorized by that subdivision are intended to be active trusts, in which the agency of a trustee is indispensable for the purposes of the trusts: not to constitute a person his own trustee, nor to effect a purpose disapproved by the law, to render real estate inalienable."

III. Whether the trust can be supported as a *power in trust*? p. 328.

1. It cannot be sustained, as a *general* power in trust because such a power contemplates an absolute sale and division of the proceeds, and because such a power cannot be executed by the grantees thereof for *their own benefit*.*

2. Nor can it be sustained as a *special* power in trust *first*, not under the 1st subdivision of special powers in trust† because it does not authorize a disposition limited to be made to any person or class of persons, other than the grantees of the power: and *second*, nor under the 2d subdivision, because the grantees of the power are designated as entitled to the benefit to arise from the disposition. In short, that no trust valid as a power in trust, is to be executed by the grantee for his own benefit. It is then beneficial.

The Ch. J. thus concludes: "That the devise, in so far as it conveys a trust estate for their benefit during the lives of the twelve nephews and nieces, is entirely void, and that the *estate vests in the heirs at law*."

The *annuities*, he holds, must also fail, as depending upon the same principles, and upon the trust for the lives of the twelve nephews and nieces and rendering the estate inalienable.

The legacies to the Theological Seminary and to St. Phil-

* Stat. of Powers, § 94. A general power is in trust where any person or class of persons, *other than* the grantee of the power, is designated as entitled to the proceeds or any portion of the proceeds or other benefits to result from the alienation of the lands according to the power.

† § 95. A special power is in trust,

1. When the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power. 2. When any person or class of persons, other than the grantee, is *designated* as entitled to any benefit from the disposition or charge authorized by the power.

ip's church are held good, as clearly authorized by the 2d subdivision of the 55th section.*

The decree, he held, must be *reversed*.

Nelson, J. states the following as his conclusions : (p. 350)

I. That the *trust* in this case, "to receive the rents and profits and *pay them over*," is a valid trust within the 3d subdivision of the 55th section : and that the *application* need not be limited to the trustees." (On this point he dissents entirely from the conclusion of the Ch. Justice.)

II. That the interest of the *cestuis que trust* is in the nature of a *joint tenancy* for twelve lives, and that the power of alienation is suspended during that time, which is in violation of § 15th of the statute, limiting perpetuities.

III. That the estate in *joint tenancy*, being an *entirety*, the twelve nephews and nieces having but one estate in the whole, cannot be reduced to the limitation of two lives within the 15th section, and the trust term is therefore altogether void.

IV. That cross remainders between the nephews and nieces are not expressly declared in the will and cannot be implied : every intent being so declared that nothing is left to implication.

V. That if the estate of the twelve nephews and nieces could be considered in the nature of a tenancy in common with cross remainders, the trust term would still be void ; because by casting off the remainders and saving the life estates only, under the doctrine of *cy pres*, we should break up the trust fund, upon which the scheme of the will depends. It would be thereby entirely deranged, made inconsistent, unreasonable and impracticable ; every general and particular intent of the testator would be defeated."

He accordingly held that the decree should be reversed. Senator Maison concurred on all points with the conclusions of the Chief Justice, as did also Senator Young.

* 2. To sell, mortgage, or lease lands, for the benefit of legatees or for the purpose of satisfying any charge thereon. 1 Rev. St. 723. (2d. ed.)

Senator Tracy held that the trust was valid for *one-twelfth* of the rents and profits to each of the twelve during his or her life. He also held that the trust "*to receive and pay over*" the rents and profits was a *valid trust*, although not created in the words of the statute: "to apply them to the use of" the beneficiary; but on other grounds he was in favor of reversing the Chancellor's decree. He says: "In conclusion, though I believe the Chancellor's decree in this case is nearer to my notions of right than the decree which I apprehend this court is about to make, yet believing that in some respects that decree is wrong, I must vote, on the general question of affirmance or reversal, in favor of reversal.

The court unanimously *reversed* the Chancellor's decree.

☞ The decree in this case is given in 14 Wend. 396, 7. 8. It declares that the trusts in the *first* article of the will are all void except the bequest therein to the Theological Seminary, and to St. Philip's church, and those annuities which were not drawn in question by the appeal: that the real and personal estate descended to the heirs at law and next of kin, as though he had died intestate. It also declared, as the Chancellor had decreed, that the ultimate remainders over to the twelve grand-nephews and nieces were absolutely void, as well as the devise of the 1-16 to those who should act as trustees. The costs of all parties in the suits below and on appeal to be paid out of the funds in the hands of the executors.

The decree contains no reference to the question of the validity of a trust to "*pay over to*," instead of "*apply to the use of*" the cestuis que trust.

HAWLEY & KING v. W. JAMES and Others. Original Bill.

W. & H. JAMES v. HAWLEY & Others. Cross Bill. 16 Wend. 61, 285. In Ch. 5 Paige, 318, 489.

Trust term to Trustees for Valid and for Void purposes ; Contingent Remainders on a Term for Years determinable on the sooner Termination of the Trust ; Dower of Widow is Equitable Estate ; Perpetuities ; Accumulation ; Vested and Contingent Remainders ; Partial Intestacy.

THE original bill in this cause was filed in Sept. 1833, by Hawley & King, two of the executors and trustees of William James deceased, against Augustus James their co-executor and co-trustee, Mrs. James the widow, and the children and grand-children of the testator, and against the other persons who had either vested or contingent interests under his will ; for the purpose of settling the construction and carrying into effect the trusts of the will. W. & H. James, two of the heirs at law of the testator and defendants in the original suit, subsequently filed their cross bill against the other parties to that suit, to set aside the will, or such trusts and devises as were illegal, and to have what was not well devised, distributed among the heirs at law and next of kin.

The testator died in Dec. 1832, having made his will about six months before, and leaving real estate valued at \$800,000, including 40,000 acres of wild land in Illinois, and personal estate worth about half a million of dollars.

After giving to his wife a life estate in certain real estate and several specific legacies, an annuity of \$3000 per annum to her, and a sum of \$3000 to be applied by her toward the maintenance, support and advancement of the children of the deceased sister, which he declares to be in lieu and satisfaction of her dower ; and after some further legacies and annuities, he declares that he has determined to confide his property to trustees ; "*That this trust shall continue and that the final division of my estate shall not take place until the youngest of my children and grand-children living at the*

date of this my will, and attaining the age of twenty-one years, shall have attained that age."

The testator at the time of making the will and at his death, had nine children living, one grand-daughter, a child of a deceased daughter, and a grand-son and grand-daughters, children of a deceased son, who were his heirs at law. All the children and grand-children of the testator but three, were minors at the time of his death and at the hearing of the cause. The widow, shortly after the testator's death, by a deed or written instrument, elected to take her dower, instead of the testamentary provision for her.

The testator by his will, then appointed three trustees of his estate, and devised and bequeathed it to them as follows: "I give, devise, and bequeath to them, all my estate real and personal, which I shall be possessed of and entitled to devise and bequeath at the time of my death, and not herein before devised and bequeathed to my wife: **IN TRUST**, to manage and dispose of the same, and to receive and apply the rents and profits, proceeds, interest, and income thereof, in the manner hereinafter directed and expressed."

He then directs them to collect all debts due to him, and to sell all his "real estate in all places other than the cities of New York and Albany, and the village of Syracuse, as fast as fair prices can be obtained;" and authorizes them at their discretion to sell or exchange portions of his real estate in those places; he also empowers them to invest so much of the proceeds of sales, and of all other moneys that should come to their hands, if not wanted to fulfil other purposes of the trust, and to pay debts and legacies, in the purchase of real estate, or in the erection of houses in either of those places, or in loans, annuities, or in any other safe and proper manner; but so that at the ultimate division of his estate, the same should consist chiefly or altogether of real estate."

Powers were also given to the trustees to make provision for the support of the widows and children of his sons then living, if they should die leaving them; to make certain advances to his sons and grand-sons, who should desire to engage in "any honorable occupation requiring capital;" also to pay a sum of not more than \$3,000 to any of his daughters or his grand-daughters, if they should choose to marry

during the continuance of the trust; all such sums, with compound interest, to be charged against them as debts due to his estate, and deducted from their respective shares on the final division of the residue of his estate."

The testator then made a devise to the children of his son Augustus, in this manner: that the trustees during the continuance and near its termination should purchase real estate worth \$50,000, and at the expiration of the trust, convey it to such of the children as the parents or the survivor should direct; that they should also set-off, and convey to two of his grand-daughters, \$20,000 worth of real estate.

At the expiration of the trust, he directs that his trustees not interested in the trust with his wife, if she were living and chose to act, should divide the residue of his estate into twelve equal parts, and convey to the persons named as follows: to his four sons and three of his daughters, each one part; to one of his grand-daughters one part; to his grand-son R. son of his deceased son, one half of one part; subject to the limitations and "retributive purposes," therein after expressed. The provisions relating to these purposes, were that the trustees were authorized in case "either of his sons, John, Edward, or Howard, or his grand-son Robert, should lead a grossly immoral, idle, or dishonorable life, such delinquent should be considered as having forfeited his share, and the trustees might withhold it, in whole or in part, and the part thus withheld was to be added to the residuary parts."

In the event of the death of any one of them, before or after his own decease, within the trust term, he gives the share of such deceased one to his or her heirs at law, and next of kin, according to the statute of descents and distributions.

The remaining three and a half parts of his estate, he directs his trustees and his wife, if living, "to apportion them according to their discretion among all or any number of those designated by his will as in any event entitled to share in the ultimate disposition of his estate; but with a just regard to circumstances, and a scrupulous attention especially to the personal merits and demerits of each individual."

The testator then provides that the *quantity of interest* to

be conveyed to the *cestuis que trust* in pursuance of the foregoing directions shall be, to the grantee for life, with power to devise the same in fee to his or her lineal descendants, in such manner or proportions as he or she may think proper; and in the event of no disposition then in fee to the heirs entitled at law, as if the grantee having derived it from the testator; had died intestate seised in fee; and the conveyance also to such of his descendants as should be born after his death, to be in fee.

Upon these clauses of the will, various questions arose in regard to the validity of the trust term; as to the election of the widow to take her dower; the marriage portions of the daughters and granddaughter; the accumulation of rents and profits for infants and others; and the remainder of the three and a half twelfths of the estate. The case was argued by no less than nine counsel for different parties.

The Chancellor held, p. 441-469:

1. As to the widow's right of dower, her election, and of what dowable.

1. That the widow of the testator having within two months after his death, executed a deed of relinquishment of the provision made for her in the will, in lieu of dower, and elected to take her dower, and procured the deed to be recorded; and having given notice of her election to the trustees and executors, who recognized her right to dower; this was a valid election to take her dower, and equivalent to an actual entry on the land, or the commencement of proceedings for the recovery of her dower, within the provisions of the Rev. Stat.* (1 Rev. Stat. 734, 2d Ed. § 14.)

2. That the property bequeathed to the widow did not

* § 14. Of estates in dower, "when a woman shall be entitled to an election under either of the two last sections, she shall be deemed to have elected to take such jointure, devise, or pecuniary provision, unless within one year after the death of her husband, she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.

therefore pass under the trust clause in the will, and must be distributed as in case of intestacy.

3. That personal property thus devolving upon the executors is the primary fund for the payment of debts, unless the testator has directed them to be paid out of the rents and profits of his real estate, with the clear intent to exempt the personal for the benefit of those who might be entitled to it under the statute of distributions.

4. That as by the Rev. Stat., the wife is dowable of the descendible equitable estates of her husband, of which he died seised, the widow was in this case entitled to dower in lands, of which her husband was tenant in common with others, and with whom he had joined in a conveyance to a common trustee, for the purpose of disposing of them with more facility ; i. e. that she was entitled to dower in such as had not been sold or contracted to be sold in the lifetime of the husband : Those contracted to be sold, upon the principle of equitable conversion, to be considered as personal estate, and the purchase money to be distributed as such, to the widow and next of kin.

5. That the annuity of \$3,000, given in lieu of dower to the widow, "for her own support and for the education and support of her children," failed by the election of the widow to take her dower, and could not be *apportioned* so as to provide for the education and support of the children out of the same.

II. As to the trusts, their objects, what valid and what illegal ; and of the effect of the illegal trusts to invalidate the estate of the trustee as to the vaild trusts, the Chancellor held :

1. That as the trust term devised to the trustees and executors can not continue a moment longer than is necessary to perform the trusts, but when its legitimate purposes have been accomplished, must lease under the express provisions of the statute, (1 R. S. 724, § 67 ;) that on the other hand, if there were any valid powers in trust contained in this will, that would not have authorized the creation of a trust estate, and which remain unexecuted at the termination of the trust term, they might still be executed as *powers in trust* for the benefit of those interested in the execution. "Although

some of the objects for which this trust term was created, and some of the contingent remainders and future interests limited thereon may be illegal or invalid, yet if any of these purposes are valid, and will continue during the term, the trust estate must continue in the executors and trustees for the same period." (p. 458.) "Such of the trusts of the will, therefore, as would have the effect, if valid, to render the estate inalienable for a longer period than allowed by the statute; and every remainder limited upon the trust term, which would have that effect, must be considered as absolutely void and inoperative in determining the validity of the trust term, and of the other trusts of the will. So far as the ascertained intent of the testator is consistent with the rules of law, the invalidity of any particular trust, interest or limitation, can not destroy those which are valid; unless they are so mixed up, that it is impossible to sustain the one without giving effect to the other." (p. 459.)

2. The Chancellor held that to render a trust term valid, it need not be absolutely dependent upon the lives of persons in being and determinable at or before the death of two such persons: that although such a trust term might be inalienable, under the 63d and 65th sections of the statute of trusts, (the first forbidding the *cestuis que trust*, and the second the trustee, to convey their respective interests,) it could in no event suspend the power of alienation for a longer term than twenty-one years, and the usual period of gestation, if there was a posthumous child. But no contingent remainder can be limited upon such a term, unless the nature of the contingency upon which it is to vest, is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the death of the testator, or at the termination of such lives.

3. As to the estate devised to the trustees; he held that it was a term of years in the testator's real property of which he died seised, and in that into which he directed the personality to be converted, for the term of twenty years and ten days; the youngest grand-child living at the date of the will being one year old, ten days after the testator's death. "In ordinary cases of a trust for the payment of debts and legacies, or other charges upon the estate, to con-

tinue until a grand-child shall arrive at the age of twenty-one, the trust estate will not be determined by the death of the child or grand-child under age; but will continue until the time when he would have arrived at that age if he had lived. (*Sweet v. Beal*, Godolph. 388; *Boraston's case*, 3 Coke, 21; 3 P. Wms. 177; *Stanley v. Stanley*, 16 Ves. Rep. 506.) But in this case it is evident, that the testator contemplated the possibility that his youngest children or grand-children might die under age; and that he intended that the trust estate should cease whenever their minorities should terminate, either by death or lapse of time. The trust estate will cease at the death of the last who shall die under age, after the survivors have all attained their majority. It is, therefore, not an estate for years determinable on lives, nor an absolute term: but it is an estate for twenty years and ten days, determinable sooner if the minorities shall cease before its expiration. And vested remainders, which are limited upon the trust term, except so far as they are to be composed of illegal accumulations directed during the term, are valid; whether such remainders are in fee or life only."—(pp. 462-3.)

4. As to the limitation and vesting of contingent remainders upon a term of years; under the 20th and 21st sections of the statute of trusts:* "The fair construction of these two sections taken together," says the Chancellor, "is, that a contingent remainder upon a term of years must be so limited that it will necessarily vest in interest within the period required by the 20th section, if it ever becomes thus vested: and that a contingent remainder for life, to a person not in being, shall not be limited on a term of years, although so limited that it will become vested within that period if

* Section 20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or at the termination thereof.

Section 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate. (1 R. S. 719; 2d. Ed.)

ever. Neither does this 20th section render it absolutely necessary, that the term of years on which a contingent remainder is limited, should be made determinable upon lives. It may be limited upon a term in gross, if the remainder itself is so limited that it must necessarily become vested in interest if ever, during, or at the expiration of not more than two specified or ascertained lives in being at the creation of the remainder."—(pp. 463-4.)

Upon these principles the Chancellor held—that the remainders for life to the seven children and two grand-children, in their several shares were valid as contingent remainders limited on a term of years; and that if such remainders became vested in interest in themselves, upon the termination of the trust term, the ultimate remainders in fee to their descendants, respectively, were also valid, as they must vest in interest, if ever, at the termination of one life in being at the death of the testator. But he held, on the other hand, that the substituted contingent remainders, in the shares of such children or grand-children as might die during the trust term, were not limited so as to vest in interest necessarily during the continuance, or at the termination of any two lives in being at the death of the testator, and were therefore void; as was also the power given to the grantees for life to devise in fee to descendants not in being at the time of their respective deaths, or to appoint other than estates in fee.

As to the remainders for life to the children and grand-children, whether vested or contingent, the Chancellor held, that those whose shares and legacies were given to them out of the rents and profits during the term, and to vest in possession by the determination of the trust estate merely, became vested in them on the determination of one life in being, and the contingent remainders to their descendants in fee were valid. But as to those shares of which the final disposition is to depend upon the decision of the trustees, as to moral character and merit, and can only take effect by the execution of the trust power or fail; those remainders must continue contingent so far as relates to any interest in the eight and a half shares, until the termination of the trust estate; and the remainders to their heirs and represen-

tatives, were void. As to the three and a half shares remaining, which were by the terms of the will—"to be apportioned by the trustees according to their discretion, among all, or any number of those designated by his will as in any event entitled to share in the ultimate disposition of his estate; but with a just regard to circumstances, and especially to the *personal merits* and *demerits* of each individual"—the Chancellor held, that the nature of the contingencies on which they were limited were not such that any estate or right in such residuary fund would necessarily vest in interest within the period of two lives in being at the creation of the remainder, or at their termination, and that devise was therefore void; and he doubted whether it was not also void on account of the uncertainty as to what persons the testator intended to be beneficially interested in this residuary fund from his description of the class.

6. The \$50,000 legacy to the children of Augustus, he held to be already vested; subject to be divested by death, or the power of appointment by the parents.

III. As to the accumulation of rents and profits, or the payment of debts out of them—the Chancellor held,

1. That as the personal representatives of a testator or intestate, had one year by the statute to get in the assets and to pay off the debts; the interest or income of the estate for that year may be applied in the payment of debts under a direction contained in the will, and in exoneration of the principal, without violating the statutory provisions against accumulations.*

* 1 Rev. Statutes, p. 720; 2d Ed. *Section 37.* An accumulation of rents and profits of real estate for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being and terminate at the expiration of their minority:

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this article permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

By *Section 38*, a direction for accumulation "beyond such period is void as to the excess of time beyond the minority; and all others are void."

2. But as in this will, the testator intended that there should be an accumulation of the rents and profits during the trust term, after which the whole trust estate is to be partitioned, with the accumulations, among the objects of the trust, such accumulation the Chancellor holds, is clearly illegal under the Revised Statutes.—(p. 481.)

3. But as the direction for the illegal accumulation, and that only, is made void by statute, the devise of the residue of the estate, will not be affected by it, if the devise of the original estate can be separated therefrom.

4. As to the direction to the trustees to add the amount of the advances made to children and grand-children out of the rents and profits, with compound interest thereon, to their respective shares at the termination of the trust, for the sole purpose of increasing the original shares of those to whom no such advance or a less one is made; it is an indirect mode, says the Chancellor, of accumulating the rents and profits at compound interest for the benefit of those who are to take estates therein, and is therefore clearly void.—(p. 482.)

IV. As to the rents and profits, and income of the estate, not legally and effectually disposed of by the will.—(p. 483.)

1. By the 40th section of the Revised Statutes relative to the creation and division of estates, (1 R. S. 721; 2d Ed.) surplus rents and profits accruing during the suspense of the power of alienation or of the ownership, when no valid direction for their accumulation is given, belong to the persons presumptively entitled to the next eventual estate; and the persons presumptively entitled to the next eventual estates in this case in the eight and a half twelfths of the trust estate, are the seven children and two grand-children. They are therefore entitled to the rents and profits accruing from that part of the estate.

2. As the direction to convert the three and a half twelfths of the personal estate must wholly fail, in consequence of the illegality of that part of the trust, it remains *personal property*; and with the interest thereon, after payment of debts, may be distributed immediately to the widow and next of kin.

The Chancellor held, that the executors were right in

filing their bill for the direction of the court, and that the cross bill was also proper ; and the costs of all parties were ordered to be paid out of the personal property as to which he died intestate.

From the decree of the Chancellor, two of the trustees, viz : Hawley and King, appealed to the Court of Errors. There were also various cross appeals entered, which were all discussed in the same argument, by the counsel for the respective appellants. Opinions were delivered upon the final decision of the cause by Nelson, Ch. J., Bronson and Cowen, Js., and Senators Mack and Maison.

On the principal questions presented to the court on this appeal, they all concurred for reversing the Chancellor's decree, as to the validity of the trust term, and of the remainders limited upon the trust term, with the exception of Mr. Justice Cowen, who was "for affirming the Chancellor's decree throughout."

Nelson, Ch. J., held, (p. 113-144 :) :

I. As to the object of the trust term, or purposes for which it was created ; and whether authorized by law.

1. That the trusts to pay legacies and portions, and to make the advances to the sons and grandsons, were in the nature of legacies and properly classed with them, and were authorized by law, if created in conformity to the statute, so as to sustain the estate in the trustees.

2. The trusts to educate and support the minor children, in the event of the death of Mrs. James, and to support the widows of sons, and educate and support children of deceased sons and daughters, and to pay annuities, were valid. Also,

3. The trust to accumulate the rents and profits not wanted for the purposes of the will, if within the statute limits and purposes. "All the others," he says, "are future, and most of them are contingent, and may never arise. The trust to pay debts I have not noticed, because it is an unlawful one ; no such trust is authorized except to sell lands. (p. 116.) Where a future trust is created, to take effect at a future day, until it takes effect, no trust exists, and no estate

is vested in consequence of such a trust, in the trustees, until the trust comes into existence.

As to the trusts,

1st. To pay legacies he holds it valid, but the trust estate would cease as to them, the moment they were paid.

2nd. As to the annuities, he holds that the trust to pay them out of the rents and profits is a valid trust, if otherwise unobjectionable, and then may sustain the legal estate in the trustees; but that it is an inalienable estate.

II. As to the duration of the trust term, whether properly limited under the statutes, he held that, (p. 120 :)

1. The trust estate or term depended upon lives, upon minorities, and upon both combined; that, if in either aspect the limitation of the estate might suspend the power of alienation beyond the time allowed by the law, then it is not valid, upon the well established principle, that a limitation which may *by possibility* create such a suspension, is void.

"If the limitation be not such that it must take effect, if at all, within the prescribed period, it is void. It is not enough that the estate, at the death of the testator, is alienable; it must be made so by the will, and not by the result of chance. In this case, the trust term is a present vested estate, and inalienable during the whole period of its limitation. The trustees can not convey; and the annuitants, for whose benefit alone, in my view, the trust exists, can not convey by reason of the 63d section. There exists, therefore, a complete suspension of ownership during the term. And even if their interest be unaffected by that, still in my judgment, the trust term would be inalienable. The trustees being unable to alien under the 65th section, the estate must remain in them during the trust. The trust term, then, I consider inalienable, both as it respects the estate of the trustees, and the interest of the annuitants. (p. 123.)

2. The question then fairly arises, and must be decided whether its limitation is within the prescribed period of the statutes, prohibiting perpetuities."

And the Chief Justice argues that if the trust term be considered an estate for 13 lives in its creation, then it is clearly void. If an estate only during minorities, and it could be certain that the minorities would cease by lapse of

time, before the termination of the lives, then it would be an estate depending upon minorities, and not upon lives; but as it may terminate upon the death of all the thirteen before any one attains majority, it is clear that in that view, it is an estate depending upon 13 lives, and may terminate with them." (pp. 124-125.)

3. If the trust term be considered as an absolute term of 20 years and 10 days, determinable by the ceasing of the minorities, it is in no respect different from such a limitation determinable upon lives, as to its possible duration. In either view, it may continue the whole of the period limited—the 20 years and 10 days. We have now this limitation, and during the lives of two persons in being. Suppose these lives should drop at the end of ten years, is not the authority of the statute to suspend the ownership exhausted? p. 125.

4. "Again; an estate to A., for the lives of B. and C., or 21 years; which of these two limitations shall control according to statute, the two lives or the 21 years? The case as presented upon this will, is an estate to the trustees to hold in trust for 20 years and 10 days, determinable upon the ceasing of the minorities of the 13 infant children and grandchildren, then over to the remainder-men. At the end of 10 years, two of the 13 lives fall in. Have not two lives in being at the creation of the estate upon which, with eleven others, the limitation of it depended, already expired? Two specified lives; and yet half the trust term remains, and may continue ten years longer. It seems impossible to avoid or explain away the repugnance between the limitation of the term and the rule of the statute." (p. 126.)

III. Whether the limitation of estates, with a view to suspend the power of alienation, must be upon *one or two specified lives*, within the true construction of § 15th, or may be departed from? (p. 127.)

1. "The position of the court below, says the Chief Justice, is that the 15th section does not require that the trust term authorized by § 55th, should be limited upon two *specified lives*, and that the common law rule upon this subject has not been abolished. But where a positive rule of real property is enacted, therein modifying or contradicting a

former one, the latter is plainly abrogated and the rule of the statute, the only one in force. Both can not exist." "*Present estates* then, as they existed before the Rev. Stat., are the only estates that are not abolished. They were extensively altered and modified : but may be said to exist still at common law subject to those modifications.

2. The Chief Justice however insists, that but one rule was intended to be prescribed for both, and should be held so, particularly since it had already been decided in the case of Lorillard's will, that § 15 applied equally to both.

After discussing this question at length, the Chief Justice says, (p. 133 :)

"From the foregoing view of the questions involved in the trust term, I have arrived at the following results, which it may be proper now to bring within more condensed limits."

I. That the trust to pay annuities is a valid trust within the 3d clause of § 55th, and may sustain in the trustees the devise of the legal estate during the term, under the 60th section of the statute.

II. That all the other trusts are either invalid or are so limited that they cannot sustain it for that period of time : they are future or contingent, or they are immediately executed and cease.

III. That the estate thus vested in the trustees is inalienable during the existence of the trust term : 1. By the operation of the 63d and 65th sections, it being a trust within the 55th section : 2. Assuming the trust to be within the 2d subdivision, the term is equally inalienable ; and,

IV. That the trust term is void,

1. Because it is an estate limited to depend upon 13 lives, as well as upon minorities, and may postpone the power of alienation for a longer period than is allowed by law ; § 15th.

2. That if it should be considered properly a term for 20 years and 10 days, determinable upon 13 minorities, it is still void, because the power of alienation may be suspended for more than two of the 13 lives upon which it depends ; and,

3. Because the trust term is not limited to depend upon

one or two specified lives in being; the only measure for the suspension of the power of alienation, since the adoption of the Revised Statutes, being a life or lives." (pp. 133, 4.)

V. "What then becomes of the remainders? (p. 134.)

1. They cannot vest in possession, under the will, because that expressly limits them, upon the ceasing of the 13 minorities. The limitation being illegal, and the trust term void, the estate does not remain in the hands of the trustees, but must descend to the heirs at law, who are immediately vested in possession, and entitled to the rents and profits."

2. Whether the remainders are valid, *so as to divest the heirs of the estate*, on the execution of the power by the trustees in pursuance of the claims of the will, providing for the distribution of the residue and the quantity of interest to each? The period during which the absolute power of alienation may be suspended by *means of a power*, is no longer than is authorized by means of a trust, or by any limitation or condition whatever. The suspension of ownership, therefore, by this power, the Ch. J. holds as objectionable as the trust term, and must be declared void.

VI. Whether these remainders are alienable, before the execution of the power of distribution by the trustees?

1. There are three descriptions of them, all going to different persons, upon the happening of different events, viz., *first*, the remainders *for life*, with power to devise; these are the *first* estates in remainder, and are limited to the seven children and the two grand children: *secondly*, the remainders to the descendants of those dying before the expiration of the trust term: and *thirdly*, the estates of those in remainder who may be devisees of those empowered to devise. All these the Ch. J. holds to be void from their creation, as coming within the same rule of inalienability, within the period of the statute.

VII. Whether the life estates being held vested, and all the remainder conceded to be contingent and void, these life estates should be executed in possession?

1. The Ch. J. holds, that under the power of the trustees to allot and convey these estates, at the termination of the trust estate, the ownership, as before shown by him, was

inalienable until the execution of the power, and therefore as objectionable in their limitation as the trust term itself. But, he says, (p. 140,)

2. "There are objections equally conclusive: the trust term is void and gone; the substituted remainders are also void and gone: these life estates are the only ones that can be sustained under any view." He then urges, that to preserve the life estates merely, as vested, and to leave the property to descend, as that of the testator to the testator's heirs would palpably defeat the intent of the testator. "So much of the will is broken up as illegal, and these facts are so connected with these life estates if deemed valid, that it is impossible to separate them without disregarding the directions of the testator. The entire estate must therefore descend to the heirs at law, and they cannot subsequently be divested on the execution of the power by the trustees." (p. 141.)

VIII. As to the effect of this conclusion upon the annuities, legacies and portions, and the shape of the final decree?

1. As to those heirs to whom beneficial interests have been given under the will, in the shape of legacies or annuities, which are valid, they must be put to their election. They cannot be permitted to take under, and also in hostility to the will, unless such is the clear intent of the testator. *Noyes v. Mordaunt*, 2 Vern. 581, and other authorities, are cited by the Ch. J.; and they, as well as many more that might have been cited, fully sustain this position. (pp. 143, 4.)

Mr. Justice Bronson, in an opinion characteristic as to its ability and reasoning, and as to some notions upon the statute of trusts to which we may hereafter advert, arrives at conclusions in most respects in accordance with the Chief Justice. But in one or two essential particulars he dissents from his conclusions. That is, (p. 144—182,)

I. "Whether the trust is valid in relation to the objects or purposes for which it was created?"

1. The trust to receive the rents and profits of lands to pay the debts, he held to be void.

2. That the trust to receive rents and profits, and "pay them over," is void; the statute only authorizes a trust to re-

ceive rents and profits, and "apply them to the use" of any person. The trustee must himself make the application.

3. That an estate where alienation is suspended, may be limited in some event besides life; but life must in some form enter into the limitation, so that the power of alienation can in no event be suspended beyond two designated lives. *No absolute term, however short, can be maintained.*

4. If a testator attempt to create a trust for any of the purposes specified in the 55th section, which is not valid as an *express trust*, it cannot be carried into effect as a *power in trust*: and if the power of alienation may be suspended in trust under a power in trust, for a period longer than that allowed by law, the trust is void. Decree reversed.

The decree entered in the cause, in the Court of Errors, is given at length in the report of this case, (14 Wend. 274, 5, 6, 7, 8, 9, 280, 1, 2, 3, 4 and 5,) and is in conformity to the principles of the opinion of Nelson, C. J. The first clause of the decree declares the *trust term* void, as "suspending the power of alienation of an absolute fee in possession for more than two lives in being, and without reference to any designated life, or any two designated lives." The question raised by Savage, Ch. J. in the *Lorillard Will* case, and again presented by Bronson, J., in the present, as to the validity of a trust "to receive rents and profits, and pay over"—instead of "to apply to the use of"—was not passed upon by the court in this case, and must be still considered a vexed question.

The court expressly declares that "the decree was not to be deemed a decision upon the title of the trustees to the lands of the testator in the state of Illinois or elsewhere out of this state or their power over them; but upon the cause being remitted to the Court of Chancery, or upon any amended or further bill in that court, that court should proceed and make such order and decree in relation to such lands as may be legal without prejudice to any party in consequence of this decree, and notwithstanding that the provision for any such party in the will may by this decree be declared to be void."

In August, 1838, an application was made to the Chancellor for further directions pursuant to the above provision in the decree. (*Hawley v. James*, 7 Paige, 213.)

By the report of a master, it appeared that the will was duly executed to pass real estate according to the laws of Illinois in force at the testator's death; and that the widow was entitled to dower in such lands by the laws of that state. It also appeared by the report that the legislature of Illinois had adopted or recognized as in force in the state, the English common law and all acts of parliament of a general nature in aid of the same as they existed prior to the 4th of James I., with two or three specified exceptions; and that there was no statute in that state, inhibiting or modifying trust estates, as authorized by the common law.

The Chancellor held that, as the testator had devised the legal estate to the trustees, *in trust* to sell and invest the proceeds in lands in *this state* upon trusts which were illegal and void by our laws, the object for which the conversion of real estate into personal had failed; and as the proceeds were not legally disposed of by the testator, there was a resulting trust in favor of the heirs at law *pro tanto*. In other words, there is no equitable conversion of the property in such a case, and it is in equity still considered as real estate and descends to the heirs of the testator.

The conclusion at which I have arrived is, that the legal title to the lands in Illinois, subject to the widow's right of dower, is now in the trustees under the will, according to the laws of Illinois, but that the whole equitable interest therein is in the heirs at law of the testator, as a resulting trust.

The trustees were accordingly directed to convey to the heirs by a conveyance executed to pass the legal title according to the laws of Illinois.

SALMON, Appellant *v.* STUYVESANT, respondent, 16 Wend. Rep. 321.

Devise to Trustees to make Partition of Real Estate of Testator ; Power to Tenants for Life to Lease for 63 Years and to appoint Estate among Children and Grand-Children ; Will Void in Part, how far Void in Whole.

APPEAL from Chancery. The respondent, Stuyvesant, filed a bill against Salmon, the appellant, before the Chancellor for the specific performance of a contract for the purchase of a certain house lot in the city of New York which had fallen to Stuyvesant upon a partition made of the real estate of which his father died seised, *according to the shares as directed by his will*. The bill stated that on the 3d of June, 1834, a contract was entered into between the plaintiff and Salmon, by which he agreed to convey the lot to Salmon, who agreed to pay him for it \$800 ; and that subsequently Salmon had given him notice that he would not complete the purchase, as he had been advised that the respondent could not convey a good title to the lot in fee simple absolute. The bill stated that the plaintiff had been advised that by the Revised Statutes, the whole will was *void*, as it respects the real estate, and that it descends to the heir at law of the testator ; or, if the will is to be deemed valid, that it is to be deemed a devise by the testator to his children in fee simple.

By his will made in 1828, the father of the respondent devised all his real estate to his executors, *in trust*, to make partition of the same into *nine shares* ; viz : *six shares* consisting each of *5-42d undivided parts* ; the whole, into *42 equal parts* to be divided, and *three shares* each to be *4-42d undivided parts* : to convey to *each* of his six sons one of the *5-42d parts* to his use, *for and during his natural life* ; with *power to lease, devise, and appoint* as follows :

1. To make leases for a life or lives or terms of years, to take effect in possession and not to be for a longer period than a *life or lives* in being at the time of making thereof, or for a longer *term* than 63 years.

2. To devise and appoint by last will and testament, the land conveyed to him for life, to or in trust for, any one or

more of his children, grand-children, nephews and nieces, for such estates and subject to such powers as he should think fit; and for want of such appointment, to the children of such son, or to the children of any child of such son, who might have died before him and their heirs as tenants in common; and if no child or grand child surviving, then the share of such son to go to the right heirs of the testator.

In respect to the shares of the *daughters*, he directed the executors to convey one of them to such trustee as each daughter should name, in *trust*, to *allow* such daughter to receive the rents and profits thereof during her life; with the same power of leasing, and of devise and appointment as to the sons.

In February, 1833, the testator made a *codicil* to his will, in which after adding three more executors, and directions as to payments made and responsibilities assumed for his sons in law, he *republished* his will made in Oct. 1828.

The cause was brought to a hearing before the Chancellor upon bill and answer, who decreed, that the *power* contained in the will, authorizing the sons and daughters to devise and appoint their shares to or in trust for their children, &c., for such estates, &c., as they should think fit, was illegal and void; that the limitation over of the *ultimate remainder* was also void; and that consequently the real estate of the testator upon his death descended to his heirs at law. The Chancellor, however, further held that the directions of the will were valid as to the *shares* to be distributed to each; that the partition should be deemed valid, and that the respondent could therefore convey an absolute fee simple in the lot in question; and he decreed that the defendant specifically perform the agreement. The defendant appealed. In the court of Errors, Cowen, J., delivered an opinion in favor of *reversal*:

He held:

I. That the *codicil* brought the will within the operation of the revised statutes, which transferred all the uses and trusts for the sons and daughters into possession. The executors took no legal estate. (1 Rev. Stat. 722, 2d Ed. § 47.)

II. 1. The power of appointment by devise, and of leasing for years, are the only other parts of the will affected by the revised statutes.

The power of appointment of estates for life, to persons not living at the testator's death, he holds to be void ; but not so as to those in *esse* : and it still may be effectual to pass a fee to either. § 17, and 129. Alienation is here suspended for one life only in being. It will be time enough to nullify the execution of this power, when we see the appointment of a life estate to a relative who was unborn when the testator died, or other estate created beyond the legal scope of the power. § 129 of Powers.* 1 R. S. 730, 2d Ed.

2. In respect to the power to lease for 63 years, he held that a lease though bad for 63 years, would be good for 21 years within the 87th section of the statute of powers, if expressly so limited ; but that § 92 had destroyed the power. The power to devise for the life of the devisee, he held, however, to be still inherent in his estate ; and a remainder in fee is thus limited, in default of appointment to the lineal descendants of the tenants for life, and in default of such, then to the right heirs of the testator.

"According to this view, all those independent parts of the will which are allowed and declared available by the statute, are saved ; and those other independent parts which are void by statute, are avoided. (*Doe ex dem. Thompson v. Pitcher*, 6 Taunt. 369.) The courts have always saved such estates as are well limited. 3 Atk. 617. (p. 327.)

"In the present case, all the direct limitations are valid. One of the powers is valid. A mere collateral beneficial power, no part of the estate to make or lease for three lives, or 63 years. What have we left ? In the first place a perfect devise for the life of the first takers. Yet the Chancellor's decree holds this void, and that the land descends in fee : though I admit it comes to the same thing, as if he had adopted the estate for life, as to the purposes of this cause.

Then as to the remainders over : It is true they are contingent, but they must vest in fee on the termination of two lives, and now, since the beneficial power to lease is gone, must at all events vest in possession on such determination.

* § 159. No estate or interest can be given or limited to any person by an instrument in execution of a power which such person would not have been capable of taking under the instrument by which the power is granted.

Can it be, that because a collateral power has failed, therefore the whole estates must go with it?

"On the whole, I can not consent to participate in the endorsement of this title. I can no more consent to the nullification of a legal operative will, on the ground that it brings the estate into a supposed unfavorable posture, than I can join in rectifying a bargain which turns out to be unfavorable to the party. In short, I will not go out of the will itself, and pry into the affairs of the estate, in order to fix a construction upon parts plainly legal and valid. Judging from what we have heard and felt, in the course of this term, I am sure if we impose an understanding of our statutes in this branch of the law, as a condition to the making of a will, very few will succeed; and if we undertake to make new wills for every partial failure, while we embark in an interminable labor, I still fear we shall not be better testators, than those who were more lawfully employed in disposing of their own estates." (p. 332.)

He says the case of *Lorillard* holds no such doctrine as that "a failure in part is fatal to the entire instrument. No will of any considerable estate, embracing various kinds of property, and seeking to provide for a numerous family, could ever stand the test of such principles."

"On the whole," he concludes, "if we agree with the Chancellor, that the will is to be retained, as to the trust power of partition, I am unable to see any reason for rejecting other provisions equally valid; and on the other hand, if, as the Chancellor holds, the land descends to the heirs at law, in either view, the respondent can not make such a title as he agreed to convey," and the decree must be reversed.

With the result of this opinion, *Bronson, J.*, and *Nelson, Ch. J.*, concurred; but declined, at that time, to pass upon the validity of the will, as both parties before the court agreed that the devise was invalid, and the only point in difference between them was, as to the proper rule of division between the sons and daughters; and which was the ground of appeal from this decree.

Bronson, J., said: "They can not take as heirs against the will, and in unequal portions under the will. We

need go no further; for whether the will is valid or not, the respondent is unable to make a good title. If the will stands, he has only a life estate; if it falls, he and the other sons must take in equal portions with the daughters. The partition and releases have not been made upon this principle. I think it is inexpedient to pass on the validity of the will, we have only heard one side of the question, and the persons interested beyond the life estate are not before the court."

Nelson, Chief Justice, concurred in the views thus expressed, and in the disposition to be made of the cause.

Whereupon the decree of the Chancellor was unanimously reversed, and the following decree entered.

"It is ordered, adjudged, and decreed, that the respondent either took a life estate under the will in five undivided forty-second parts of the real estate of the testator; or, he together with the other sons and daughters took the real estate as heirs at law in equal shares; and in either case, the respondent can not make a good title in fee simple to the lot mentioned in the pleadings in this cause."

The decision of the Court of Errors in the foregoing case, not having settled the question of the validity of the will of Nicholas Wm. Stuyvesant, a new bill for the specific performance of an agreement for the sale of one of the lots belonging to the estate was filed by one of the sons before the Chancellor, upon a contract made after the decision of the Chancellor in the case of *Salmon v. Stuyvesant*, but before the decision in the Court of Errors. The case presented substantially the same facts and questions, except that all the children and heirs of the testator had joined in a release of the lot in question to the complainant. This case is reported in the Court of Errors under the title of

ROOT, appellant, v. STUYVESANT, respondent; 18 Wend. 257, 318. Opinion of the Chancellor given, 18 Wend. 263, 4, 5, 6.

The Chancellor says: "In consequence of the doubts expressed by some of the members of the Court of Errors, when the case of *Salmon v. Stuyvesant*, came before them,

since the making of the contract for this lot, the defendant refused to take the title. It is, therefore, I presume, not very material how the question is decided here, as neither party will rest satisfied with my decision. But I have as yet, seen nothing to induce me to believe that the testator intended to leave his children pennyless, for the purpose of giving an estate worth a million of dollars, if it was in a situation to be used for any beneficial purpose at this time, to unborn generations. The circumstances of the case show that it was impossible, if he was in possession of his senses, that he could have understood the provisions of the Revised Statutes as applicable to this will; and it is therefore impossible to give any effect to the limitations over, without entirely defeating his intention to give a present and beneficial interest to his children." The Chancellor therefore holds, that to carry the residue of the will into effect, after striking out the provisions rendered void by the Revised Statutes, would be to defeat the real intentions of the testator; and that therefore, under the releases given by the children and heirs, the plaintiff had acquired a good and valid title to the lot sold, and was entitled to a decree for the specific performance of the agreement.

For the reasons of this decision, the Chancellor refers to his opinion in *Salmon v. Stuyvesant*, which he gives at large.—(pp. 262, 3, 4, 5.) In that he said: "As the testator survived until after the Revised Statutes went into operation, and republished his will in 1833, it has now become impossible to carry into effect the provisions of the will, except in one particular, without defeating the obvious intentions of the testator, at the time the will was made. The property was of such a nature that it was only valuable for building lots; and the taxes and assessments to which it would be subject, in a part of the city which was rapidly improving, would be at least equal to the amount for which it could be rented for any other purpose. The testator had also sold a portion of his building lots, and by the terms of sale, the purchasers were required to erect valuable buildings thereon, of a particular description; and he had covenanted on his part, that whenever buildings should

be erected on his adjacent lots,* they should be of a similar description, such as no mere tenant for life would think of erecting on property held by such a tenure merely."

The Chancellor, after pronouncing the power to lease void by the Revised Statutes, then says: "If the testator could have known the operation of his will, under the provisions of the Revised Statutes relative to powers, was to deprive his children of all beneficial interest in his estate,(?) and to tie it up for the sole benefit of another generation, it is very evident that he would have given the fee to his children, or have devised to them an absolute term of 63 years."

The power in trust to the tenants for life to devise and appoint their shares of the estates to, or in trust for, their children, grand-children, nephews and nieces, he also declares illegal and void. He however holds that part of the will relating to the proportions of the sons and daughters, in the division of the estate, to be valid. (This latter question was not presented in the case of *Root v. Stuyvesant*, as the releases of the heirs and children had cured that defect in the plaintiff's title.)

From this decree of the Chancellor in *Root v. Stuyvesant*, the defendant appealed to the Court of Errors, where the case was submitted on written arguments.

The Judges of the Supreme Court delivered opinions *seriatim*, for a reversal of the decree of the Chancellor, upon grounds similar, in the main, to those of Mr. Justice Cowen, for reversing the decree in *Salmon v. Stuyvesant*. In the following conclusions, they all concurred:

1. That under the operation of the Revised Statutes, the testator's children took the legal estate in their respective shares, of the same quality and duration, and subject to the same conditions as the equitable or beneficial interest intended to be devised to them; the executors retaining the power to execute the will in respect thereto, but no legal estate or other interest in the premises.

* [] It no where appears, in the report of the case, how many had been sold; still less, whether, if those adjacent lots had been left without being built upon, any or how much damage would have been sustained.

: 2. That the remainders over and the powers of appointment were both valid ; and that the power of appointment was valid, notwithstanding the generality of the terms conferring the right to create successive estates for life in persons not *in esse* ; the legal presumption being, that the donee of the power will execute it in conformity to, and not in violation of the rules of law.

3. That notwithstanding the statutory prohibition of powers to tenants for life to lease for more than 21 years, the power to lease in this will was good and valid to make a lease for twenty-one years, and void only for the excess : that an illegal execution would not be presumed ; and even that a lease for a longer period would, upon well settled authorities, be void only for the excess.

4. That a power to lease is void only when it is, in the terms of its creation, required to be executed in a mode prohibited by law, and not otherwise.

5. That the failure of the intent of the testator, that his children should have life estates, with the power of leasing for 63 years, is not such a frustration of the general intent of the testator as to justify the declaring the residue of the will void, and permitting the children to take as heirs at law ; and, that the testator manifestly intending his children should not take the fee, but life estates only, with a power to lease, the mere reduction in the value of their life estates, by the failure of the power of leasing, is not such an inconsistency with the general intent of the testator as to the quality and duration of their estates, as to authorize a court of justice to confer a fee simple absolute on the tenants for life, in lieu and substitution of their power to lease for a term of years ; not even if the life estates by that means were rendered entirely unproductive.

6. That the language of the will being plain and unambiguous, when the true meaning of the testator in the several parts of his will has been ascertained—the rule both at common law and by the revised statutes is, not that the courts shall carry the will into effect if *all* is legal, but *so far* as it is legal : That the court has no more power to declare a legal part void on such grounds, than they have to declare an illegal one valid.

Nelson, Ch. J., at the close of his opinion, (p. 277,) says : "Thus the life estates are an inseparable part of the scheme of this family settlement, and must be maintained to carry it into effect. If I must take the place of the testator, and decide for him whether he would give up the power to lease, or the residue of his will, as both cannot stand, I must say he would have yielded the former ; that the disposition of the residue does not necessarily hang upon it ; indeed, the power to lease constitutes no part of the testator's estate, as the whole is well devised without it ; it would improve the value of the gift to the tenants for life, and may be regretted that it cannot be sustained ; but the estate still remains to them. It seems to me to be yielding too much to this diminution of value by the loss of it, to permit it to work so potent an effect as to destroy the estates of the tenants for life ; all the estates in the remainder, and all the other powers in the will ; to destroy, in other words, a legal and valid disposition of the entire estate of the testator.

Bronson, J. says, upon the same point, (p. 282,) "Every thing is legal and valid except the power to lease, which has failed. Much as I may regret that the immediate descendants of the testator will probably fare worse than his more remote posterity, it is not in my power to apply a remedy."

"We are referred to the cases on the will of Mr. Lorillard and that of Mr. James ; but there is nothing in either which can aid the respondent. In each of those cases all the estates and interests which were declared void, sprung out of an illegal trust ; they were built upon the trust, and necessarily fell with it. They had no separate existence, but were part and parcel of the trust ; that being void, they must fall with it.

"It seems to be supposed that the language which I used in *Hawley v. James*, 16 Wend. 144, concerning a will, good in part and bad in part, militates against the validity of this will. Although the remark referred to was a general one, and not on the turning point of that case, I see nothing in it to qualify or recall ; nor can I perceive how it favors the overthrow of this will."*

* The observation evidently referred to here, is as follows : "Distinct, in-

Cowen, J., in relation to the supposition of the Chancellor, that "if the testator was in possession of his senses, it was impossible that he could have understood the provisions of the Revised Statutes as applicable to this will; and that if he could have known what their operation was, it is very evident that he would have given the fee to his children, or have devised an absolute term for 63 years," asks: (p. 298:) "Upon what authority are we to assume that this testator did not know the law? Has such a principle of construction been before acted upon? By what authority are we to adopt, as a principle of construction, the testator's knowledge of the law in 1828, and his ignorance in 1833? Suppose he had committed a mistake in 1828, was that the day of saving grace and light, and 1833 an hour of darkness which is to destroy a testament, as if its author had been of unsound mind? No. When first made, the will contained a valid power to make leases. After the Revised Statutes, the testator, by republishing his will, or even suffering it to stand, strikes out the power. It is a change which he had a right to make." (p. 298.)

"I remember, that shortly after these statutes took effect, a thief broke into an outhouse and stole an article of small value. In 1828, it would have been but a petty larceny; in 1830, it was a burglary; and although he had not yet a single year's opportunity to learn the legal nature and consequences of such an act, the court sentenced him to the state prison. The argument was much stronger for his ignorance of the change which the law had undergone, in his case, than that now urged. Yet, I ask, what judge would have listened to it?" He adds, on this same subject, at page 306:

"It would have been some consolation, when we were told of the darkness of 1833, and that we are to presume ignorance of the true construction of our new statutes at

dependent provisions, which are in themselves free from objection, will not be invalidated by other separate provisions, which are contrary to law. But if the good and the bad are so intermingled that the one cannot be separated from the other, then both must fall together; and where a particular disposition, valid if alone, forms part of, or depends on a general purpose, contrary to law, both will be void, and must share a common fate."

that period, if we could have been told or could we now tell at what era the eclipse shall be considered as removed."

"On the whole, all the provisions in the will, except that for leasing, being as I think valid to their full extent, my conclusion is, that we have no power to disturb them. If we have the power, on the notion of consulting the testator's intent, I feel equally clear, that we should altogether violate that intent, by creating a fee in his children." (p. 313.)

Mr. Senator Dickinson delivered the only opinion in favor of *affirming* the Chancellor's decree. If not encumbered with too much legal lore, it is almost superabundant in rare specimens of judicial rhetoric. For example, he says, p. 314,

"By an examination of this will, it will be seen, that it originated in one of those vain and mistaken efforts of human ambition, to rear and perpetuate a monument of accumulated wealth, upon which a long line of descendants might rise above the storms and floods of poverty and adversity; and that its progress was arrested by the Revised Statutes, which confounded the language of its builder.

"The revised statutes make the following summary inroad upon this last will and testament, leaving a meagre skeleton of what came from the hand of the testator. *First.* They declare the devise of the real estate to the executors in fee in trust, is void. 1 R. S. of Trusts, § 47 and 49. *Second.* They destroy the right of the testator to perpetuate the property in his family in the manner and to the extent provided by his will. *Thirdly.* They cut off the power of the life tenants to lease for over 21 years, which is sought to be given by the testator. *Fourth.* They substantially destroy the trusts created for the protection of the married daughters of the testator."

[In respect to this last objection, which the Chancellor also faintly suggests, Mr. Justice Cowen well answers it, in his opinion in this case. He says: p. 310. "But the Chancellor thinks it an evil that the trust for the benefit of the daughters should be turned by the revised statutes, into a legal estate, and subjected to the power of the husband. Such may be the consequence; but surely the evil is not mitigated by giving them a legal estate in fee; yet that is

done by his decree. Under the statute, they alone could suffer. By giving them a fee, we place the power in their hands to ruin themselves and their children too, by aliening their whole estate on the request of their husbands. The remedy appears to me worse than the disease."

Craving indulgence for detaining the reader from it, we return to Mr. Senator Dickinson's opinion.

The senator's next position is, that the power of leasing is void for 21 years, as well as 63, as it is not one of those powers, "enumerated and defined." (1 R. S. Stat. of Powers.) "Although we can not look at the thing devised for the purpose of giving construction to the will, we can certainly do so for the purpose of ascertaining the intention of the testator. The will sought to give the children bread; but legislation has turned it to a stone. The whole beauty and harmony of this will is (? are) broken down by the strong arm of written law. We are not permitted to re-fashion it, after the plan of its projector, but can only gather up the disjointed fragments, and unite them with *judicial cement*! It will then, neither speak the language of the testator, nor do justice to his children. As a will, it will counteract the law of descent, and give only a naked life estate in name, weighed down by numerous contingencies; and this too, to the children of his body, who, it is evident, he intended should participate liberally in his bounty. This patrimonial tree offered shade and shelter to the children of the testator. Its foliage has been withered, and its branches lopped off, by the omnipotence of legislation, but they are pointed to its naked and sapless trunk, and there invited to seek repose and protection. The whole life and spirit of the will has (have) departed, and the effort to resuscitate it by judicial power, will be as unavailing as an attempt to "back to its mansion call the fleeting breath," of Nicholas William Stuyvesant. We can not warm it into life and being, nor re-invigorate it with the soul breathed into it by the testator; but as an inquest to declare the cause of its death, we should pronounce it to be that of legislative visitation. Is, I ask emphatically, this scarred and mutilated instrument or any separate or independent provision of it, the last will and tes-

tament of Nicholas W. Stuyvesant? Would he have set to it his hand and seal as such? I can not believe it for a moment."

Whether owing to the logic or to the rhetoric of Mr. Senator Dickinson, or to the reasoning and authority of the Chancellor's opinion, the Court of Errors *affirmed* the Chancellor's decree.

For *reversing* the decree, the president of the senate, Ch. J. Nelson, Justices Bronson and Cowen, and Senators Lawyer, Tracy and Wager, 7. For affirmance, 25 Senators.

The principle of this decision seems to be, as stated by the note of the reporter, "That, as the power to lease was reduced from 63 to 21 years, (if even valid for that term,) in view of the peculiar situation of the property devised, the carrying the residue of the will into effect according to its terms, *would defeat the principal intent of the testator*, and that therefore it ought to be declared *void*, except as to the direction of the proportions in which the children should take and the power of partition given to the executors; that with these exceptions the children of the testator took as *heirs at law*; and the *powers in trust* to appoint the remainders, and also the remainders over were void."

The next case upon the statute of trusts and powers, and also involving the above question of the validity of a will where part is valid and other parts void, was that of,

HONE'S EXECUTORS *v.* VAN SCHAICK, 20 Wend. R. 564.
In Ch. 5 Paige Ch. R. 230.

THE testator, *John Hone*, there devised by his will, (made in July, 1831,) after a specific devise and bequest to his wife, the residue of all his estate, real and personal, to his executors for the purposes of his will. He directed his executors to convert all his personal estate, with certain exceptions, into cash and invest it in mortgages or United States stock; to lease his real estate in the city of New-York, and to sell that out of it, to be invested in the same manner, so as to form, with the income, *one general fund* for the purposes of his will. The executors were directed to pay certain annuities

to his widow and to a niece, and to divide the residue of the income of the fund, from time to time as accruing, equally among his seven children and the descendants of two deceased children. At the expiration of 21 years from the date of the will or as soon thereafter as they should deem it discreet, they were directed to divide the real and personal estate among the heirs of the testator or their legal representatives. Special directions were also given as to the manner of making partition and limiting the extent of interest of the parties taking the same, so that the children of the testator should, in no case, take more than a life estate in the premises, the ultimate remainder over being limited to their descendants or the then heirs of the testator. By a codicil in August, 1831, he increased the bequest to his wife and the annuities to his and her nieces. He also by the codicil gave to each of his grand-children living at his death, \$6000 to be paid at 21 or marriage; not to be paid, however, without the approbation of their parents to be expressed in writing; the testator desiring, that after the child was of age or married, the parents would fix a discreet or proper time for the payment of the legacies. They were directed to be paid out of the personal estate, and all the residue of the real and personal, was to remain subject to the provisions of the original will as thus modified. In 1832, the testator died leaving a widow, seven children, and the descendants of two deceased children him surviving.

The executors filed a bill before the Vice Chancellor of the 1st circuit against the parties in interest, to obtain a construction of the will as to the validity of the devise to the executors in trust. The Vice Chancellor decreed that the devise of the real estate and all the trusts declared upon it were void, and that the direction to divide the real estate after the trust term ended, was also void. But he held the bequest of \$6000 to each of the grand-children valid, and decreed payment thereof according to the will.

On appeal from this decree of the Vice-Chancellor, it was affirmed by the Chancellor; whereupon an appeal was taken by the executors to the Court of Errors. The opinion of the court was delivered by

Mr. Justice Bronson, who said: "The testator attempted,

by means of a trust to receive rents and profits, to render his lands inalienable for a term, of which more than nineteen years remained unexpired at the time of his death. This he could not do. The absolute power of alienation was suspended for more than two lives in being at the creation of the estate. The lives must be designated, and life must, in some form, enter into the limitation. No absolute term, however short, can be maintained. The statute has forbidden it.

"The whole trust estate, and the remainders limited upon it, are consequently void. (*Coster v. Lorillard*, and *Hawley v. James*.) The power in trust to make partition at the end of the term, is subject to the same objection as the trust. It works an illegal suspense of the power of alienation. That this may be the effect of a power in trust, and that the power will then be void, was adjudged by this court in the above cases.

"The estate descended to the heirs at law, subject to the execution of the power, (if valid.) These and other grandchildren, and other remote descendants, not in being at the testator's death, or who may not be born until the last day of the term, may, (under the will,) be entitled to share in the partition. It is evident, therefore, that at no time during the term, can such an absolute fee in the land be conveyed, as may not be defeated, in whole or in part, by the execution of the power. It could not be done if all mankind were to join in the conveyance."

"In *Root v. Stuyvesant*, he observes, the power of appointment, which was there held valid by all the justices of the Supreme Court, was a power which the grantees might execute or not, at their pleasure. It imposed no duty on the tenants for life; it did not require them to do an illegal act. But this is a special power in trust, and is imperative. The testator has directed a division which the law forbids. Such a power I think cannot be upheld for any purpose. He states that "no distinction was made on the argument between the real and personal property" included in the trust; and he cites 1 R. S. 773, §§ 1, 2, which prescribes the same rule for both in this respect.

The legacies to the grand-children he holds to be vested

and free from all objection ; and having no necessary connection with the trust adjudged to be void, and being vested immediately on the death of the testator, were valid. He says : " The counsel seem to have been agreed that the rule of the common law and of our statute is still in force, and that the intention of the testator, so far as is consistent with the rules of law, must be carried into effect, notwithstanding the decision of this court in *Root v. Stuyvesant*. That case is in direct conflict on this point, with the decision of this court in *Harley v. James*, and seems only to be regarded as an adjudication between the amicable parties then before the court, and not as a precedent which can affect the rights of third persons."

Whereupon the decree of the Chancellor was unanimously affirmed.

☞ The case of *Root v. Stuyvesant* may, therefore, be considered as one of that class which, if not expressly overruled, yet "*stands upon its own peculiar circumstances*," like that of *Murray v. Riggs*, 15 J. R. 571. Unless the courts are to be constituted testators-general of all who attempt to dispose of their estates by devise, its doctrine is not likely to be ever again applied to any other than that identical will, for which it has become a rule of property among the parties and those claiming under them. In all others, its principle has since been, and it is hoped will continue to be disregarded, as it was in the following case before the Court of Errors, involving the same general question how far a trust created for purposes, of which some are good, and others void, by the statute of trusts can be supported as to the legal purposes for which the trust was created ?

DARLING and others, appellants, v. ROGERS and others, respondents, 22 Wend. 483.

Appeal from Chancery.

In November, 1836, Thomas Darling made an assignment of all his real and personal estate to assignees, in trust for his creditors. The assignment stated that the object of the assignor in its execution, was to make over and secure to his creditors, or to the assignees in trust for them, all his estate real and personal. The trusts declared were that the assignees should, with all due diligence, sell and dispose of the estate, real and personal, at auction or private sale, for the most that could be got, or to *mortgage* the real estate or any part thereof, as they should deem most advisable and best calculated to be the most productive and advantageous; collect the debts; and from the proceeds after deducting costs, charges, and expenses, pay certain preferred creditors whose debts were estimated at \$70,000, and with the residue of the proceeds, pay and satisfy his remaining creditors.

In October, 1837, the respondents filed a judgment creditor's bill, charging the assignment to be fraudulent, praying for a discovery, for a receiver, and an injunction to restrain the assignees from selling, mortgaging, or encumbering the property assigned to them. The assignor and assignees put in separate answers denying all fraud, &c. Upon a motion on the part of the complainants for a receiver, and of the defendants, to dissolve the injunction, the Chancellor made an order adjudging that no estate in the real property of Darling, vested in the assignees by virtue of the assignment to them, and ordered the appointment of a receiver, &c. The injunction so modified it, as to authorize the assignees to sell the real estate with the approval of the receiver. In respect to the personal property, the injunction was wholly dissolved.

From this decree Darling and his assignees respectively appealed. An opinion in the case was delivered by Cowen, J., who said, "The trust declared was, it is admitted, valid in respect to the personal estate; and would have been equally so of the real estate, for the purpose of selling it,

had it been confined to that. The 55th section of the article of trusts, allows express trusts: 1. To sell lands for the benefit of creditors. 2. To sell, mortgage, or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon." The article nowhere authorizes, in terms, an express trust to mortgage lands for the benefit of creditors; and though as a general rule, a trust to sell lands and distribute the proceeds, shall be construed liberally, and might include a power to mortgage,* yet when the two subdivisions are read in connection, there is great difficulty in saying that the legislature did not (in the first section) use the words, "to sell lands in their strict sense, which would only confer the power to give a deed of bargain and sale." He declines to decide whether it might avail as a power in trust. (p. 486-487.)

He pursues. My opinion is that it can not be allowed as an express trust. But then the more material inquiry arises whether a failure in this particular shall destroy the whole deed. A clause has found its way into this instrument by which the assignees may sell, but the scrivener has added what is perfectly void, that the trustees may also mortgage." He refers to what was said by Gibbs, Ch. J., in *Thompson v. Pitcher*, 6 Taunt. 369, who said, "I can not find in this act of parliament any words which make the entire deed void. I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void; but I think the statute makes nothing more void, and that the deed, so far as it passes other lands, not to a charitable use, is good." This deed is consistent with the rules of law, Mr. Justice Cowen concludes, in all except the trust to mortgage. The Chancellor so regarded it, in respect to the personal es-

* [] This implied power to mortgage under a power to sell, which is said to be a "conditional sale," (*Mills v. Banks*, 3 P. Wms. 9,) seems however to be confined to cases where the power is to sell to raise a particular sum; as a power to "raise a sum," out of an estate, enables a sale of it. Sugden on Powers, 392. But it is doubtful, if a mortgage be first made, whether the power to raise by sale or mortgage, is not wholly exhausted; and if the parties intend that a sale should be afterwards made, the intention should be clearly expressed." *Ibid.*

tate. I think he should also have included the real estate, and the trust to sell. He did not in my opinion go far enough ; and therefore the decree should be reversed.

Mr. Senator Verplanck delivered an opinion in which he concurs with Mr. Justice Cowen in the result, but holds that the trust to mortgage given by the assignment, not only did not vitiate the whole instrument, but on the contrary was a good trust by the 2d clause of the 55th section of the article of trusts, under the terms, "to satisfy any charge," upon lands : that the assignees in this case might lawfully mortgage to pay off a lien by judgment, &c., on the lands assigned. And of this opinion was the whole court ; as the decree of the Chancellor was unanimously *reversed* ; and the following resolution adopted, was incorporated into the decree ; as follows :

"It is further ordered, adjudged and decreed, that an assignment of real estate, in trust, to sell or mortgage for the benefit of creditors at large, is valid for the purpose of selling, though void for the purpose of mortgaging : also, that if any of the creditors have judgments, mortgages or other charges on such estate, the trust to mortgage is valid so far as it seeks to pay or secure the same ; or to mortgage a part of such assigned estate to pay an incumbrance on such part, though it be void for the purpose of paying or securing creditors at large."

✎ In the case of *Kane and Wife, appellants v. Gott and others, respondents*, the principle that a will may be void in part, and yet good for the residue, and that the portions not contrary to law will be saved, was fully recognized and acted upon by the Chancellor, (7 Paige, 521,) and his decree was unanimously affirmed by the Court of Errors.

Cowen, J., speaking of some "remote collateral provisions," as he calls limitations as to income to unborn persons, which were admitted to be void, and from which it was argued that the whole will was void, says, "Nothing is better settled than the direct contrary ; and the contrary was held by this court in the late case of *Darling v. Rogers*." *Kane v. Gott*, 24 Wend. 641.

The other cases which have come before the Court of Errors, and the Chancellor upon questions arising under the statute of trusts, since the foregoing decisions on those questions by them respectively, are those of *Depeyster v. Clendining*, 8 Paige, 295, reported in the Court of Errors, under the title of *Bulkley v. Clendining*, 26 Wend. 21, where the decree of the Chancellor was affirmed; *Van Veghten v. Van Vechten*, 8 Paige, 105; *Parks v. Parks*, 9 Paige, 107, in which an appeal was taken, and the Chancellor's decree unanimously affirmed in December, 1842; *Irving v. De Kay*, 9 Paige, 521. In this the Chancellor takes occasion to say, "I consider it conclusively settled by the decisions of the court of dernier resort, confirming the decrees of this court in the cases of *Gott v. Cook*, and of *Van Veghten*, that any legal trust is sufficient to sustain a devise or conveyance to the trustee of an estate commensurate with the trust, without reference to the illegal trusts which the testator or grantor has attempted to create in the same estate. And since the decision in December, 1839, of the case of *Darling v. Rogers*, the Court of Errors has steadily adhered to and acted upon those cardinal and conservative principles in the construction of devises and conveyances in trust, which were stated and intended to be acted upon by this court in the case of *Hawley v. James*, but which the appellate court thought were misapplied by this court in relation to the trusts of Mr. James's will. The principles stated in that case, and which are now the settled rules of law, are, that the intention of the testator, when it shall have been ascertained from an examination of the will in connection with the situation of his property, &c., at the time of making such will, must be carried into effect by the courts, so far as that intention is consistent with the rules of law; that although some of the objects for which a trust is created, or some future interests limited upon the trust estate, are illegal and invalid, if any of the purposes of the trusts are legal and valid, and would have authorized the creation of such an estate, the legal title vests in the trustees during the continuance of such valid objects of the trust, except in those cases where the legal and valid are so mixed up with those which are illegal and void, that it is impossible to sustain

the one without giving effect to the other. And that every disposition by the testator of an estate or interest in the rents, profits or income of his real or personal estate, and every trust in the will, which, if valid, would have the effect of rendering the property inalienable for a longer period than is allowed by law; and every remainder or other future estate or interest, limited upon the trust which would have that effect, must be considered and treated as absolutely void and inoperative in determining the validity of a devise of the legal estate to trustees, or the validity of any other provision of the will." p. 528.

✎ Although seventeen years have elapsed since the Revised Statutes went into operation, it may be very well questioned whether our courts have made much greater progress in settling the construction of our new statute of trusts than the English courts had made, in the time of Lord Bacon, towards "a true and sound exposition," as he expresses it, of the Statute of Uses. 27 Henry VIII. c. 10. That statute, "an act concerning uses and wills," was passed in 1536. In 1700, Lord Bacon, then Mr. Francis Bacon, one of Her Majesty's counsel, writes, that in 37 Regiæ, which was but five years before, "by the notable judgment of all the judges assembled in the Exchequer Chamber, in the famous cause between Dillon and Freine, concerning an assurance made by Chudleigh, (Chudleigh's case, 1 Rep. 121,) this law began to be reduced to a true and sound exposition, and the false and perverted exposition which had continued for so many years, grew to be controlled." (Bacon on Uses, p. 2.) An interval of 60 years had thus elapsed from the time that important act took effect, before it began to be reduced to "a true and sound exposition." And five years after, that "famous case" of Chudleigh, when Sir Francis commenced his lecture called his "Reading upon the Statute of Uses," (according to the original meaning of *lecture*,) he assigns as his reason, for choosing "to read on that statute, that it was "a law whereupon the inheritances of this realm are tossed at this day, like a ship upon the sea, in such sort that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances will

stand good, and what will not." Whether our statute of trusts is doomed to wait so long to be "reduced to a true and sound exposition," is a question that must be resolved by posterity. For who shall say that other cases under our statute, now passing current, may not ere long, as well as *Root v. Stuyvesant*, be classed with those "false and perverted expositions" which had continued," says Sir Francis, "for so many years, though never countenanced by any rule or authority of weight?" The statute of Uses, (27 Henry VIII.), is a plain and simple, and not very comprehensive one, compared to our new statute of Estates and Trusts to say nothing of Powers. The few but difficult cases that have arisen under it which have been adjudicated upon by our courts, suffice to show that, as Sir Francis expresses it, "as it cometh to pass always, upon the first reforming of inveterate errors, many doubts and perplexed questions have arisen which are not resolved, nor the law thereupon settled." Now, if our courts suppose that they have reached *terra firma* in the construction of our statute of trusts, or are any nearer the haven than the English courts in the time of Lord Bacon and good Queen Bess, they will only claim to have done much more in seventeen years than the courts at Westminster were able to do in four times that period. To correct any such pretension, let them but look at the contrariety of opinions in the foregoing cases as they have successively arisen; not only a contrariety between different courts, but between judges of the same court. Let them then look at some of the startling questions that may arise out of their decisions, be they ever so correct in these particular cases; questions that not only may, but must necessarily arise from the ever varying facts and circumstances attending each new cause that presents itself. Looking at those, we find ourselves still "tossed like a ship upon the sea," though our judges are doubtless entitled to the same credit which Sir Francis awards to the judges during the period of which he speaks. "Neither is this any lack or default in the pilots—the grave and learned judges—but the tides and currents of received errors and unwarranted and abusive experience have been so strong, as they were not able to keep a right course, according to the law." These tides and currents were certainly

too strong for our pilots, the grave and learned judges, in the case of *Root v. Stuyvesant*; and though, in that case, they did not differ, yet in others they have not always agreed among themselves as to what point of the compass they should steer to "keep a right course according to the law."

It would be an idle, if not an unpardonable presumption in us, to attempt to seize the helm in the midst of this voyage of exploration and discovery, pretending either that we see land, or that our pilots have been sailing on a wrong course. On the contrary, waiving the metaphor, instead of venturing to pronounce upon all or any of the opposite conclusions arrived at in the foregoing cases upon the statutes of estates, trusts, and powers, by the Court of Errors and the Court of Chancery, it would require a volume to review them as their present importance as precedents would demand; and, with the prospect of a "Code Civil" before us at an early day, which, it is to be devoutly wished, may sweep the complex, and in some instances contradictory provisions of those three statutes out of existence, it would seem to be of very doubtful future benefit to bestow any great labor of analysis or comparison upon them. When we say that some of those provisions are contradictory, we speak rather of the contradictions found in them between their spirit and intention, as professedly developed in the provisions so carefully guarding against suspensions of the power of alienation, for instance; and those provisions, on the other hand, which have imposed so many new clogs and fetters upon the transfer of real estate.

Before the statute, tenant for life of a trust estate could join with the trustee and remainder-man, and convey a fee in possession. Now if the trust be a valid one, to receive the rents and profits of land, and apply them to the use of the tenant for life, neither trustee nor *cestui que trust*, nor both together, though ever so well agreed, can get rid of their respective estates. It was Justice Twisden, if we recollect rightly, who said in some case before him, according to the reporter, "you can not put an estate into a man in spite of his teeth;" but if Mr. Justice Twisden had lived to see our statute of trusts, he would have seen not only that an estate may be put into a man in spite of his teeth, but

kept there too ; and though you pull out all his teeth, you can not extract the estate out of him. No allowance made for change of circumstances, no discretion given to the trustee as to the expediency of selling the estate for life, and vesting it in other property, more productive and more easily managed by the trustee ; but there the estate has been put, and there it must remain ! And all this in a statute which is so astute to preserve the ready alienation of real property ! Nay, it is doubtful even whether the testator or grantor in such a case, could himself confer the power or, if you please, 'power in trust.' (A vile phrase.) It would certainly be held void if such a narrow spirit of construction prevailed as has been manifested in regard to some of the clauses of this statute. For would it not be contended and with at least, color of argument, that though a trust or a power to sell real estate be authorized by those statutes, yet that must be taken to be to sell that which the statute has not rendered inalienable ? Now, whether the statute really was intended to restrain a trustee, who in good faith, for the benefit of and in conjunction with the tenant for life, should desire to part with such a trust estate, and invest the proceeds in government stock, upon the same trusts, and to thus absolutely prevent them from conveying their interest to the remainderman, and by uniting the two estates, give the land a marketable value—we can not since the case of *Lorillard v. Coster*, venture to question. But, we dare ask, ought so absurd and mischievous a provision be allowed to stand. What can be in general so disadvantageous to the improvement of real estate, whether vacant city lots, or half cultivated and perhaps wild lands, as to subject them to the uncertain tenure of a life estate ? It is true a power to lease for twenty-one years, if given by the will or grant, would remove a part of the difficulty ; but still the clog of total inalienability renders it impossible for the remainderman or his grantee, to purchase at any price with a view to make extensive and permanent improvements. Then again, the provision that "a contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited, be such that the remainder must vest in interest, during the continuance of not more than two lives in being

at the creation of such remainder, or at the termination thereof." (§ 20th, Division of Estates.) What is the object of such a provision? Let the grammatical question pass; though it certainly does read, "that the remainder shall not vest until the termination of the remainder" itself, if we do not go back to the beginning and search with some care for the antecedent of "thereof." But if the object of this section was to prevent that dreaded suspension of the power of alienation for a long term of years, while the remainder was yet contingent, why not, in the name of common sense, and of that policy which is so anxious upon the subject of suspension, at once fix a term of years, which in no event or contingency should be exceeded? Why not give a reasonable certainty, instead of an unreasonable uncertainty? Why suspend the power of alienation by one or two threads, so that the tenant of the trustee or owner of such a term, must be all the while in the condition of poor Damocles, when it was so easy to prescribe a precise term upon which a contingent remainder might be limited?

These same remarks apply to the 21st section, which also, to guard against some unknown and dreaded mischief, provides that "No estate for life, shall be limited as a remainder on a term for years, except to a person in being at the creation of such estate." Now, if the 20th section had but fixed the exact duration of the term for years, upon which a contingent remainder might be limited, it is easy to see that this section would have been wholly unnecessary, so far as the idea of suspension of alienation is concerned. But by itself as it stands, what purpose was it intended to answer? You may limit *a fee* upon a life estate for two lives, to twenty or twenty thousand unborn remainder-men, if you happen to have the fee, and desire to create so many remainder-men; but if you have a lease-hold estate for fifty or a hundred years, you cannot be permitted to say your eldest son shall enjoy it during ten years, and if his younger brother who will then be of age, shall attain twenty-one, he shall then come into possession of it, and enjoy it for life! Was ever any thing better contrived than these two sections, to produce that uncertainty of tenure and enjoyment, which the policy of the law as much abhors, as the suspen-

sion of alienation itself? And if the testator went further and said, that in case his younger son did not attain the age of twenty-one, then the term to go to the children of the eldest son, if he should marry and have issue—all these limitations would be impossible by these sections; and yet what mighty mischief, if the preceding term were limited to twenty-one years, could have been foreseen by the legislature, which prompted them to prohibit these convenient and harmless dispositions upon terms for years?

Then as to the *construction* of these two sections: A testator wishes to give an estate for a term certain, say ten years, in his fee simple estate, to one of his children, to answer a particular family purpose, and not to subject it to the uncertainty of life estates, and then to devise the estate to two other sons for their lives, and to their children or grandchildren in fee at the end of the term, in case the sons should be dead. Now, what possible or probable mischief could come of such a disposition, or what more danger of perpetuities, in such a case, than if the term of ten years was not interposed? The two lives are running on with the term, and the estate must vest at their termination, in their heirs at law as remainder-men, which the statute permits. Now, how does the term prolong the lives, or the lives prolong the term, so as to bring such a case within the range of illegal suspension? And yet, according to the system of 'strict construction' of these statutes, the estates for life would be good, and the remainders void. The term for ten years remains in the eldest son, the two lives are gone, and yet we have to wait till the end of the term to see who shall take. To be sure, this might be guarded against by a provision that the remainders to the children and grandchildren should vest on the death of the two sons; but the testator not having made these statutes his special study, or perhaps even, if he be not *inops consilii*, his counsel not having the fear of the 20th and 21st sections before his eyes, makes that unfortunate slip; and away go the estates in remainder, taking with them only one-third of the provision made for the descendants of the younger sons, it is true, in the case put. But suppose the remainder-men not heirs at law? Then not a *scintilla juris* remains in them. Did

the legislature ever intend any such absurd consequence as this? It cannot be.

Though this may seem like questioning some of the foregoing decisions on this point, we disclaim any such intention. On the other hand, our sole intention is to show that such a senseless restraint upon testamentary or other dispositions of real estate, ought not to remain in our statute book. Fix the precise term upon which contingent remainders may be limited at as short a term as you please, but do not perforce oblige every disposition of real estate upon which they may be limited, to be of that precarious and most disadvantageous species—a mere tenure upon one or two lives. If ten or twenty might be inserted, there would be a chance of something like stability, and some encouragement to improvements, but since that also is decided to be against public policy, or at all events against the statute, it surely deserves the consideration of legislative wisdom whether a term of twenty-one years, or of some other reasonable duration, ought not to be substituted for the interest of all parties, and of the public, for this wretched tenure of one or two lives.

Other provisions there are to be found in these statutes which equally require the pruning hook. For instance; the whole of the 55th section of the statute of Trusts, which undertakes to define all the objects and purposes for which express trusts may be created, might without at all impairing the policy of the law, be very well spared. The provision of the 45th section that “every estate and interest in lands shall be deemed a legal right cognizable as such in the courts of law, and that of the 47th converting all estates in trust, in effect, into legal estates, would seem to be all that was necessary to provide in regard to the nature of the estate, so as to put an end to all trusts where the trustee is considered as a mere conduit of conveyance. Then, the reservation in the 48th section, that “these provisions shall not divest the estate of any trustees, in any existing trust, where the title of such trustees, is not merely nominal, but is connected with some power of actual disposition or management, in relation to the lands which are the subject of the trust,” if it had been extended to trusts hereafter to be created, would

appear to be sufficient to preserve all future legal trusts of that description, and to define their character and limits with sufficient accuracy. "The power of actual disposition or management," if a good enough definition for existing trusts which are thus reserved, would seem to have been a sufficient one also for trusts thereafter to be created. Every additional word in the statute on this subject has but multiplied doubts; and one doubt is often the mother of twenty more: for if a doubt arise upon a certain clause of a statute, all the clauses in any way connected with it, generally partake of the same difficulties of construction. They even go on in an arithmetical progression, in some instances of statutory construction. Take the 2d clause of the 55th section, "To receive rents and profits and apply them to the use of any person," nobody denies that equivalent expressions may be used in creating a trust, and that where they are used, an estate vests; but it has not yet been decided whether as Chief Justice Savage, and Mr. Justice Bronson hold, a trust, "to receive rents and profits, and pay over," is or is not an equivalent expression; and if not, then what is to become of the estate, is a question hardly yet mooted. Does it vest in the beneficiary under the provisions of the 45th and 47th sections, or is it void? Is the estate executed in the donee in possession by the statute, "as a legal estate, of the same quality and duration, and subject to the same conditions as his beneficial interest," in the words of the statute, or is the trust valid as a mere power in trust to the trustee, or if the power is a nullity, is the beneficial interest of the *cestui que trust* gone? These will lead again to the enquiry who is to be considered as "entitled to the actual possession of lands, and the rents and profits?"

But we are again "tossing like a ship upon the sea," getting among tides and "currents of received errors," which we do not care to encounter. In fact, the voyage must be of a most uncertain duration, to however skilful a navigator undertakes to explore and survey those foggy latitudes, without further maps and charts than we yet have; and he had need be a Columbus, who attempts to penetrate into those unknown regions beyond, into which no explorer has yet ventured. But it is time to conclude our desul-

tory observations upon these statutes ; which we do with the anxious hope that nothing we have said upon the difficulties and doubts attending their construction, may discourage the "diligent student" from endeavoring to master them. We pray in all sincerity, that he may find and send us all a good deliverance from the doubts and difficulties to which they have given rise.

CHAMPLIN v. JONES, 7 HILL, 245.

In Ch. 10 Paige, 274.

Devise ; Trust and Trustee.

AN estate was devised in 1821 to three persons, trustees, of whom C. was one, in trust to receive the rents and income for the use of C. during her life and to divide the estate among her children after her death, with an executory limitation over to the issue of such of the children as should die before the time appointed for distribution ; and the trustees were authorised to sell or lease the estate in the meantime for the purposes of the trust and to invest the proceeds. In November, 1841, an agreement was signed by C. and all her children except one, who refused to assent to it, that the property should be sold in Jan. 1842, and the *proceeds divided*. The property was put up at auction by the trustees in Jan. 1842, and bid in by H. the defendant, who afterward refused to complete the purchase, alleging that the sale was illegal, having been made for *the purpose of dividing the proceeds during the lifetime of C.* and not for investment under the devise. Bill was filed against H. for a specific performance of his contract.

The Chancellor held that the defendant was not bound to complete his purchase ; as the sale of the estate was not for the purpose of investment, but with the avowed intention of distributing the proceeds between C. and her children immediately, during the lifetime of C., it would be a violation of the trust so far as regarded the interests of the issue of the children who might happen to die during the lifetime of C. That the purchaser who had notice of the intended dis-

position of the proceeds would not be protected if the proceeds should be thus misapplied ; and the provision in the Revised Statutes to protect persons who pay money in good faith to trustees, against a misapplication of the trust fund, will not protect a purchaser who has actual notice that the sale is not made for the objects of the trust, but with the intention of misapplying the proceeds. He also held that :

“ Where an estate is devised in fee, in remainder, after a life estate, with an *executory* limitation over to the issue of the devisee in case of his death, such dying is construed to apply to the time when the remainder is limited to take effect in possession, and not to the time of the death of the testator ; and the term issue in such case is a term of purchase and not of limitation.” But,

The Court of Errors held that as there was *no evidence* that the trustees intended to sell for the purpose of distribution, except the agreement of Nov. 1841, H. was bound to complete his purchase ; also held :

That the agreement having been drawn up with the intention that it should be signed by all the children of C. before it took effect ; and one having refused and filed a bill to restrain the trustees from giving a deed, the agreement was incomplete for want of execution. Mrs. C. the trustee did not execute it as trustee, but only in respect to her interest as one of the *cestuis que trusts*. Per Bronson, J. delivering opinion of the court. Decree *reversed*, 12 to 3.

MILLER v. GABLE, 2 Denio, 492—570.

Reported 10 Paige, 627.

Religious Corporation ; Trust and Trustee for Particular Form of Faith.

IN this case, which was a religious squabble for the temporalities of a church between two sets of corporators and their respective adherents, the Chancellor held that where the trustees of a “German Reformed Church” which was in ecclesiastical connection with and subject to the church judicatories of the Dutch Reformed Church (Calvanistic) in

the United States, attempted to dissolve the connection, and employed German *Lutheran* pastors without the consent of a large portion of the church and congregation or of the *classes* with which the church was connected, and refused to permit the stated supplies of preachers provided by the *classes* to occupy the pulpit; that such conduct of the trustees was a diversion of the funds and property of the church, from the purposes for which they were contributed by the original donors.

He held also that those members of the church who adhered to the original doctrines of the church and who had continued their ecclesiastical connection with those church judicatories under whose jurisdiction the church was when the property of the church was acquired, and who had also kept up a proper corporate organization by the regular election of the proper church officers, as trustees of the corporation from time to time, were entitled to the *temporalities of the church*, and the Court of Chancery has jurisdiction to prevent a diversion of them from the purposes to which they were originally devoted, and to require them to be appropriated to the *form of worship* and *religious* trusts which they were intended to support.

The Court of Errors *reversed* the decree of the Chancellor, but from the variety of grounds maintained by different senators in favor of *reversal*, it is somewhat difficult to ascertain which particular ones were sustained by a majority of the court.

Senator Folsom held, 1. "That the deviation from the faith and practice prevailing in the church at former periods, if indeed there was any such deviation proved, was too slight and unimportant to warrant the interposition of the court below, even if such an interposition by that court on account of an alleged departure from the belief of the founders or benefactors of a church would even be justifiable which he considered to be matter of doubt. 2. That the connection of the church with the Reformed Dutch Church was voluntary, and was never binding on the former and was now at an end. 3. That the Court of Chancery is deprived of jurisdiction by the provisions of the statute. (2 R.

S. 466, § 57.) And 4. But the order of the Vice Chancellor in the former suit mentioned in the pleadings and proofs was a bar to the relief sought in this suit.

Senator Barlow held, that a majority of the church or the trustees, if incorporated, were at liberty to deviate from the doctrines which prevailed at the time of the donation, and that such deviation will not produce a forfeiture of such property, or entitle the minority adhering to the old faith to the enjoyment of it.

2. That when property is in terms conveyed in trust to support a particular form of worship or certain doctrines, the Court of Chancery may enforce the trust and prevent a division of the property.

3. That in this case, no portion of the temporalities appeared to have been conveyed upon any trust relating to particular religious doctrines or church government; but if they were, the deviation was not material enough to authorize the Court of Chancery to interfere.

Gardiner (President) held, that the terms of the trust deed "for the worship of God in the German language," were sufficiently answered by the form of worship in the faith of the Lutheran as well as of the Calvinistic tenets. That upon the subject of church government or ecclesiastical connection, (the two grounds on which the Chancellor placed his decision,) the declaration of trust was entirely silent.

The judgment was reversed by a vote of 14 to 3.

USURY.

BUSH v. LIVINGSTON, 2 C. C. E. 66.

Securities originally valid, Enforced in the hands of an Usurious Assignee, for the sum actually advanced upon an Usurious Agreement.

APPEAL from Chancery. The facts in the case were as follows:

L. being indebted to E. in a sum of \$6222, secured by two mortgages, and E. pressing him for his money, L. applies to Bush, the complainant, to advance the sum of \$5600 to E., and take an assignment of his securities; agreeing to repay it in ninety days, with a douceur of \$400; L. having arranged with E. for the balance due to him. The transaction accordingly took place, and Bush took an assignment of the bonds and mortgages giving a receipt, by which he acknowledged himself to hold them as security for the payment of \$6000, and upon payment to procure them to be cancelled.

Upon a bill for foreclosure filed, Livingston the mortgagor set up this in his answer, insisting that the securities were void in Bush's hands, and praying to have them decreed to be given up to be cancelled.

The Chancellor having awarded a feigned issue to try the question of usury, the complainant appealed from the order; and upon full argument, it was held by the Court of Errors, (Spencer, J., delivering the opinion,)

1. That the securities being untainted in their inception, were valid in the hands of Bush as a security for the sum actually advanced.

2. That the court, having the whole merits of the case before them, would make a final decree, and order the Chancellor to carry it into effect, as they had already done in the case of *Gouverneur & Kemble v. Le Guen*, (ante.)

Decree of the Chancellor reversed accordingly.

LAW v. MERRILLS, 6 Wend. 268.

In S. C., reported 9 Cow. 65.

Evidence of Usury ; Judgment Record.

ASSUMPSIT on promissory note, and defence of usury.

On the trial in the Common Pleas, the witness called to prove it, gave evidence of some declarations of the payee tending to show that he was receiving, or was to receive, usurious interest by some agreement ; not proving whether made at the time of the loan and giving the note, or subsequently ; and the judge in charging the jury, left the question open to the jury to infer that it related to a time subsequent ;—whereupon the defendant's counsel insisted that the court misunderstood the testimony of the witness, and proposed to recall him to explain, and the court refused to do so, and the plaintiff had a verdict. On writ of error,

The Supreme Court held, that this refusal to recall the witness was good ground for writ of error and reversal : That although the re-examination of the witness was discretionary with the court, yet if the court erred in the exercise of its discretion, it was error.

The Supreme Court also held, that no subsequent agreement being shown, the Common Pleas should have charged the jury that the inference of law was, that the agreement alluded to by the witness, was at the *time* of the contract of loan, and the court not having so charged the jury, it was error. On error brought on this judgment,

The Court of Errors reversed it, and restored the judgment in the Common Pleas, holding that a judgment will not be reversed because the court omitted to charge the jury as to the legal inference arising from the testimony in the case. That to sustain error on the ground that the court neglected to charge the jury upon a question of law arising upon the facts, it must appear by the bill of exceptions, not only that the facts upon which the question was raised, existed, but also that the court was distinctly *requested to instruct* the jury as to the law on that point.

The court also held, that a judgment will not be reversed because it appears from the record, that the jury have only

passed upon the plea of *non-assumpsit*, when there is also a plea of *payment*—the finding of the jury upon the issue under the plea of *non-assumpsit* necessarily negating the plea of *payment*.

Nor will the judgment of a subordinate court be reversed for a refusal of that court to grant a new trial.

Judgment of Supreme Court *reversed* accordingly.

RAPELYE, appellant, v. ANDERSON, respondent ; 4 Hill, 472.
Reported 9 Paige, 483.

Usury on Sale of Bond and Mortgage.

APPEAL from Chancery. Bill filed to set aside a contract on the ground of usury. A bond and mortgage for \$3000, payable in one year from date, with interest to become due half-yearly, and on which over five months' interest had accrued, were assigned absolutely by the holder for \$2600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3000, and contained a covenant that so much was due and owing on the bond and mortgage. At the time of executing the assignment, the assignor also executed to the assignee a bond with surety conditioned that the mortgagor should pay the \$3000, together with the interest, by the day appointed for that purpose in the securities assigned.

The Chancellor held, that the transaction was usurious, and a mere device to evade the statute, (of 1837,) and decreed the securities to be given up and cancelled. On appeal,

The Court of Errors reversed the Chancellor's decree, holding that the transaction was on its face, a mere sale of a chose in action, unconnected with a loan, and therefore not usurious.

Per Franklin and Bockee, Senators.—The assignee's right of recovery upon the bond of guaranty, would be limited to the actual amount paid for the bond and mortgage, notwithstanding the consideration expressed in the assignment.

Decree *reversed*; 12 to 11.

HENRY and PIERCE v. THE BANK OF SALINA, 5 Hill, 523.

Reported 1 Hill, 555.

Usury ; Evidence ; Witness.

THE word "plaintiff," in the second and eighth sections of the act to prevent usury, (Laws of 1837, p. 486-487,) extends to the party in interest as plaintiff, though he may not be the plaintiff on the record.

Accordingly, where in an action on a promissory note, the defendant pleaded the general issue, and gave notice of the defence of usury, verifying the notice pursuant to the 2d section of that act, the Court of Errors held, contrary to the opinion of the Supreme Court on the point, that the defendant might call and examine the plaintiff in interest notwithstanding the suit was brought in the name of another ; that the offence created by the 6th section of the act, is not consummated until the usury is actually received ; that consequently a mere agreement to receive it would not render the party indictable, and therefore he was not privileged from testifying.

The judgment of the Supreme Court was *reversed*, 13 to 8 ; but whoever reads attentively the opinion of Putnam, Senator, in favor of affirmance, will, we apprehend, agree with him, that the decision of the Supreme Court ought to have been affirmed.

The Chancellor in his opinion has not stated the effect and principle of the decision in *Mauran v. Lamb*, 7 Cow. 174, and the cases cited by Senator Putnam to the same point, as they have been heretofore understood. The Chancellor seems to suppose that such a witness is only excused, because he is called "to make a disclosure which would forfeit the money actually lent, and interest." But the cases show no such reason for the privilege. It is simply that he is the real plaintiff in interest, and therefore not bound to testify at all for the defendant in a court of law, to any fact whatever. It would seem then that as he is not included in the terms

of the act, not being the plaintiff on the record. On that point the argument of Senator Putnam seems unanswerable.

STEVENS v. WHITE, 5 Hill, 548.

This was a case depending on the construction of the same statute, in which the plaintiff called the endorser, judgment by default having been entered against him to R. that he was plaintiff in interest, and took the usury, and the same judgment of reversal was pronounced.

12 to 6, for reversal.

POST, appellant, v. THE PRESIDENT, &c., of the BANK of UTICA, respondents.

Reported 8 Paige, 640.

When Mortgagor can not set up Usury.

LANDS were purchased at a sheriff's sale, with the knowledge that they were covered by a prior usurious mortgage, and the purchaser upon obtaining the sheriff's deed, filed a bill in equity to set aside the mortgage, and to have the premises cleared of the incumbrance; but not alleging payment or offering by his bill to pay the amount actually loaned, &c. To this bill, the defendant demurred upon that ground.

The Chancellor overruled the demurrer, holding that the provisions of the 8th section of the Rev. Stat. relating to usury, and the 4th section of the usury act of 1837, embraced not only the party to whom the original loan was made under the term "borrowed," but also his sureties, heirs, devisees, and personal representatives, and any parties claiming the mortgaged premises under his title.

The Court of Errors held that those sections did not extend to a grantee of premises covered by an usurious mortgage; that the term "borrower" did not apply to him, and

that therefore he could not maintain a suit in equity, to set aside the mortgage without paying or offering to pay the sum actually loaned. They held the demurrer well taken and ordered the bill to be dismissed.

Decree reversed, 16 to 2.

✎ The case of *Cole v. Paige*, (10 Paige, 583,) was commented on in the opinions delivered by the Senators in favor of reversal, and disapproved. It may therefore be considered as *doubted* and *denied*, if not expressly overruled.

UNITED STATES COURTS.

THE PEOPLE *ex rel.* KANOUSE *v.* THE JUDGES OF THE NEW YORK COMMON PLEAS.* In Sup. Court, 2 Denio, 197.

Mandamus to order Cause from N. Y. Common Pleas to the Circuit Court of the United States.

THIS was an application to dismiss an alternative writ of mandamus, requiring the Common Pleas to make an order for the removal of a cause in that court to the United States Circuit Court, on the petition of the defendant in the suit, Kanouse, setting forth that the plaintiff, J. M. M., was a citizen of New York and himself a citizen of New Jersey. The suit was originally commenced by a declaration in which the damages were laid at \$1000. On the presentation of the petition the Court of Common Pleas allowed the plaintiff to show by affidavit that the whole amount of his claim and

* This case, belonging properly to the title of mandamus and intended to have been included in our examination of cases on that subject, (ante) was accidentally misplaced; and we have therefore given it a place as one of some importance not only on that subject, but as presenting a question it is believed entirely new in our own state courts.

the matter in dispute in the cause did not amount to \$500, and afterwards to amend accordingly; The C. P. thereupon denied the motion for the removal of the cause to the U. S. Circuit, and Kanouse then applied for and obtained the alternative mandamus which it was now moved to dismiss. (Special Term, Feb. 1846.) Bronson, Ch. J. said that he was inclined to agree with the C. P. as to the right of the party to show by affidavit the real amount in dispute; but that clearly after the damages were reduced below \$400, so that he could in no event recover more, there was no longer any ground for removing the cause. He said also:

"But there is another reason why we ought not to interfere. The courts of the United States have power to issue writs necessary for the exercise of their jurisdiction, and if a mandamus may issue for the purpose of exercising (or obtaining) an appellate jurisdiction, then the writ should issue from the appellate court. The U. S. Circuit Court in Tennessee has issued a mandamus to a state court in a case like the present. (*Spraggins v. The County Court of Humphries*, 1 Cooke, 160.) I am aware that the Court of Appeals in Virginia awarded a mandamus to an inferior court in that state to compel the removal of a cause into the Circuit Court of the United States, (4 Hen. & Mumf. 173.) and this court would do the same thing in a proper case, if there was a necessity for it. But until it shall appear that the United States Courts want the power, this court, he says, cannot act without the appearance of making an officious tender of its services;" and he quashed the alternative mandamus.

☞ This declaration of Ch. J. Bronson that "This court would do the same thing in a proper case," seems very like reasserting the proper power of the court over the judicial decision of an inferior tribunal. The reason he gives for not interfering in the case we do not intend to question; but if the damages had not been reduced, and the C. P. had notwithstanding denied the petition for removal, we cannot doubt that the Supreme Court, though not *bound* to issue the writ, on the ground stated, might very properly have done so. But yet, according to the other cases of this description decided by that court, since the case of the *Oneida Judges*

we hardly think the power could consistently have been exercised ; and we therefore note this remark of the late Chief Justice as a *dictum* in favor of the views expressed by us upon his decision in the case of *The People v. The Dutchess County C. P.*, (ante p. 352.) and with which decision the remark seems to be at variance.

(In *Gordon v. Longest*, 16 Pet. 97, the Supreme Court of the United States *reversed* the judgment of the Court of Appeals of the state of Kentucky, where the Circuit Court of the state had refused to allow the cause to be removed to the Circuit Court of the U. S. on the ground that it did not appear to their satisfaction that the sum in controversy exceeded \$500, although the sum demanded in the declaration was \$1,000. M'Lean, J., saying: "The damages in the plaintiff's writ give jurisdiction to the Circuit Court of the U. S. whether it be an original suit in that court or brought there by petition from a state court." He says also, that after the presentation of the petition in such a case "it was, in the language of the (judiciary) act, the duty of the state court to proceed no further in the cause. And every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals was *coram non judice*." 16 Pet. 104.)

WILL.

PRINCE V. HAZLETON, 20 J. R. 502.

Nuncupative Will.

THE Court of Errors held in this case, reversing the decisions of the Surrogate and of the Court of Probates, that a *nuncupative will* is not good unless it be made when the testator is *in extremis*, or overtaken by sudden and violent sickness and has not time to make a will. And that the words, "last sickness" within the provision of the statute, (Sess. 36, ch. 31, § 14,) is to be understood *last extremity*.

REID v. VANDERHEYDEN, 5 COW. 179, in E.
In Chancery, Hopkins R. 409.

Will ; Competency of Testator ; Feigned Issue ; Quashing Appeal.

Appeal from decree of surrogate. S. Vanderheyden, brother of the half-blood, to J. G. V., the respondent, died without issue, but leaving his wife *enciente*, and a will, by which he gave his property to other persons than the respondent ; but in case of a child born, then to his wife and child in fee. J. G. V. filed a *caveat* against the proof of the will of the deceased.

The surrogate proceeded, after citing the parties, to take proofs ; and before the decree was made, a child was born. Four days after its birth, the surrogate made a decree establishing the will. J. G. V. appealed from this decree.

On motion to the Chancellor (Sanford) to quash the appeal, on the ground that his interest having ceased, he was no longer a proper party to the cause, the motion was overruled, and the Chancellor awarded an issue to try the question of the sanity of the testator, more than 15 days having elapsed from the time of making the first order. On appeal to the Court of Errors from the last order, awarding the issue,

The Court of Errors held that the first order was so connected with the last, that it was examinable by the court, although not appealed from within the 15 days.

The court also held that the Chancellor should have quashed the appeal ; that a person having no interest in the subject matter of a suit, cannot be a party in any court ; and if he have an interest at the commencement of a suit, and that interest ceases, the right to prosecute further, or to appeal, also ceases ; that the child and its mother took the whole estate by the will ; or if that were set aside, then they took it as dowress and heir at law.

The order of Chancellor S. for a feigned issue was accordingly annulled and vacated without costs below to either party, and the appeal ordered to be quashed.

It was also held, that the declaration or order of a surrogate, upon establishing a will, that each party should pay his own costs, is not the subject of an appeal. 1. Because this was not a decree in form. 2. Because a surrogate having no power in such case to award costs or decree in form for costs, it is *coram non judice* and void without reversal on appeal; and that even if there were an interest in the costs merely, that would not give the party a right of appeal in regard to any other matter.

WATTS AND LEROY, Appellants v. PUBLIC ADMINISTRATOR IN THE CITY OF NEW YORK. 4 Wend. 168.

Execution of Will of Personal Estate before the Revised Statutes.

The testator, John G. Leake, died, leaving a paper drawn up by himself, with his name in the beginning of it, in a fair hand, engrossed on conveyancing paper, with a seal attached thereto, with a disposition of both real and personal estate to a large amount, manifesting deliberation and foresight in its provisions: this testamentary paper was found in an iron chest among his valuable papers, without signature, having an attestation clause not witnessed.

The appellants, Watts and Le Roy, named as executors, propounded it as a will, and applied for letters testamentary.

The surrogate held it an incomplete testamentary paper, and rejected it as a will, and committed the administration to the public administrator. On appeal, the Chancellor affirmed the decision of the surrogate. But,

The Court of Errors held, that this instrument, so prepared by the testator, though not formally executed, was a good and valid will of the personal estate therein mentioned, according to the common law, as generally understood and received in England and this country on 19th April, 1775, when the common law was adopted as a part of the law of the State. Decrees of surrogate and Chancellor reversed—17 to 9.

¶ Since January 1, 1830, by Revised Statutes, a will of personal as well as real estate is void, unless subscribed at the end of the will, in the presence of at least two attesting witnesses.

JACKSON, *ex dem.* BROWN v. BETTS. 6 Wend. 173.

In S. Ct. 9 Cow. 208.

Will ; Revocation ; Evidence.

Ejectment by plaintiffs as devisees, and not as heirs, of Benajah Brown, on a joint and several demise from all and each of the plaintiffs.

The plaintiffs proved that a will devising to them the premises in question, had been duly executed, and was in the custody of the testator for five years afterwards, and within *ten months* previous to his decease, but could not be found after his death. The defendants proved that, after having made his will, the testator upon some occasion took certain papers out of his desk, where he kept all his valuable papers, and burnt the papers taken out, but without showing that the will was among them or had ever been there. The Supreme Court held that it was not sufficient evidence to go to the jury, upon the question of revocation, even in connection with the fact that the will could not be found at the testator's death ; nor should counsel be allowed to urge these matters to the jury as evidence from which they might infer a revocation. On writ of error,

The Court of Errors held, that upon the foregoing state of evidence, the legal presumption was that the testator had destroyed it *animo revocandi*, although it appeared that within a fortnight before his death he applied to a scrivener who had drawn a codicil, to draw another codicil to his will, which, however, was not drawn, nor was the will itself produced to the scrivener at the time. The will in this case was made in 1816, and of course not affected by the provisions of the Revised Statutes upon the subject.

It *seems* to have been held, also, that a *duplicate* will, in the hands of a third person, would, under such circumstan-

ces, be considered as revoked and annulled by the destruction or non-production of that in the hands of the testator.

Chancellor Walworth, in his opinion, maintains that the declarations of the testator, in his last illness, are admissible to show that the testator had destroyed it, or that it was still in existence, *sed qu.*; but that evidence of the relative situation, in point of property, of the testator's children, is inadmissible in support of the presumption of the revocation of a will, where there is no change in the circumstances of the children, between the making and alleged revocation. Judgment reversed.

McCARTER, Executor, &c., of Philip Jacobs, v. THE ORPHAN ASYLUM SOCIETY, 9 Cow. 420.

Opinion of Jones, Ch., 9 Cow. 440.

Devise of Real Estate to Corporation.

BILL against executors for devise and legacy.

The testator, Philip Jacobs, seised of real estate, devised that if at his death, he should have a child living, the rents and profits should be received by his executors and applied to the support, &c., of the child, the surplus to be invested in stock, to accumulate and be paid over to the child at 21, or marriage. He gave all the residue of his real and personal estate, after payment of legacies and other bequests, to "*The Orphan Asylum Society in the city of New York,*" (a corporation,) the bequest to take effect immediately after debts and legacies were paid, if he should leave no child; or if he should leave a child, then upon the child's death, intermarriage, or attaining 21. The will then gave to his executors, all his real estate, subject to the trusts aforesaid; and declared his will to be, that when such child should attain 21, or marry, his real estate should be sold by his executors, and one-half of the proceeds paid to the child, if it should attain 21, or marry. The testator died seised, and a posthumous child was born to him, which died before 21, and unmarried.

The Chancellor, (Jones,) held, that the devise to the corporation of the Orphan Asylum, was a trust in the executors, and that though a devise directly to a corporation may be void by the Statute of Wills, (1 R. L. 364,) yet a devise to a natural person was good. That the trust should not fail for want of trustee, if there were not appointed such trustees; and that the court would, in such case, appoint one. He also held, that the act of incorporation authorized the Orphan Asylum to take real estate by devise under the power to take lands by purchase.

On appeal from that part of his decree,

The Court of Errors, however, held, that the devise to the corporation was direct on the death of the child, and not a trust for the corporation. The will was therefore held void as to the real estate, within the Statute of Wills.

It was also held, that the charter of the company authorizing them to take lands by purchase, did not authorize them to take by devise. But that the word *purchase* should be taken in its restricted, popular sense, and not in its broadest legal signification.

Judgment *reversed* accordingly.

STEWART'S EXECUTORS *v.* LISPENARD and others; 26
Wend. 255, 326.

Capacity of Imbecile Testatrix to make a Valid Will.

THE questions decided in this case upon the will of Alice Lispenard, depend so much upon matters of fact, that we should hardly be justified in stating them at large; the only principle of law asserted by the decision being one that can hardly be called tangible, and so indefinite and evanescent, indeed, as to baffle any thing like exactness in its terms, or certainty in its application.

The Court of Errors, however, upon the strength of it, reversed the decision of three subordinate tribunals—the Surrogate, the Circuit Judge of the first circuit, and of the Chancellor—who all concurred that the evidence in the

case established a clear case of mental incapacity existing from childhood, so as to incapacitate her from making a will, or understanding the nature of it ; still less of comprehending its dispositions.

The Court of Errors seems to have held, that mere imbecility of mind, be it ever so near the boundaries of idiocy, is no disability to making a will, if the party have been born so, and has not fallen into such a state of mind from sickness, age, grief, or other accident, so as to wholly lose his understanding ; and will not incapacitate persons of full age, who are not insane or idiots, in the strict sense of the legal terms. Such imbeciles *a natiuitate*, may, under certain circumstances, make a will, if it be a proper will in itself, and in favor of a suitable devisee, and such an one as a sane person might possibly have made.

As to the question of fact in the case, upon which the Court of Errors passed, they may have been right : but if so, it would seem to have been well maintained by Mr. Justice Bronson that the proper decree was to reverse the decrees of the courts below, and to award a feigned issue. But the court, by a vote of 11 to 8, refused ; and held that the decree should be of *reversal*, and ordering the will to be admitted to probate, &c., and declaring the testatrix at the time of making her will, to have been of sound mind and memory, and capable of disposing of her property by will ; which was accordingly done by a vote of 12 to 5.

✍ In the case of *Blanchard v. Nestle*, 3 Denio, 37, this decision is adopted by the Supreme Court in its full extent ; and the decision in that case is expressly put on the same ground, with some expression of approbation by Mr. Justice Jewett, who delivered the opinion of the court.

WAGER.

YATES v. FOOT, 12 J. R. 1.

IN S. Ct. 11 J. R. 23.

Wager ; Pleading.

THIS was an action against the stakeholder of a bet made upon the result of a state election.

The Supreme Court held that the wager was illegal, as contrary to public policy, and the loser might recover back his deposit from the stakeholder.

The Court of Errors held that the wager was illegal, but that no action lay by the loser to recover back his deposit from the stakeholder, all parties being in *pari delicto*, though the loser had given the stakeholder notice not to pay the money to the winner; and accordingly *reversed* the judgment.

¶ A question was raised as to the suit being brought by the proper party, the stakeholder having received the money from an agent, and knowing nothing of the principal. But the Court of Errors held, that if the action could be sustained, it was well enough brought by the principal, on whose account the wager had been deposited.

WRIT OF ERROR.

In re, CLASON v. SHOTWELL, 12 J. R. 31.

In S. Ct. 10 J. R. 304.

To what Writ of Error will lie; Forcible Entry and Detainer.

THE Court of Errors held in this case, that the decision of the Supreme Court on a prosecution for a forcible entry and detainer, where no return could be obtained to a certiorari, by reason of the death of the justice of the peace, before the record was made out, and the Supreme Court had investigated the facts on affidavits, and awarded a restitution, might on a writ of error to the Court of Errors, be reviewed upon the evidence presented to the court below.

They also held that every final or definitive sentence or decision of the Supreme Court by which the merits of a cause are settled or determined, although such sentence or order is not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a *judgment* within the meaning of the constitution of this state, and is subject to the appellate jurisdiction of the Court of Errors.

Aliter, as to interlocutory orders of the Supreme Court.

✎ The expression of the clause of the constitution referred to is, "when a writ of error shall be brought on a judgment of the Supreme Court." Art. 5 of Constitution of 1821, Sec. 1.

In the constitution of 1846, Art. 6, Sec. 25, is contained the following provision in respect to the jurisdiction of the Court of Appeals:

Section 25. "The legislature at its first session after the adoption of this constitution, shall provide for the organization of the Court of Appeals, and for transferring to it the business pending in the Court for the Correction of Errors,

and for the allowance of writs of error and appeals to the Court of Appeals, from the judgments and decrees of the present Court of Chancery and Supreme Court, and of the courts that may be organized under this constitution. Section 21st of the same article provides that "The legislature may authorize the judgments, decrees and decisions of any local, inferior court of record, of civil original jurisdiction, established in a city, to be removed for review directly into the Court of Appeals."

The judiciary act of May 12, 1847, Sec. 8, provides that "The Court of Appeals, shall have full power to correct and redress all errors that have happened or may happen in the present Supreme Court and Court of Chancery, and that may happen in the Supreme Court organized by this act, &c. Section 10 provides that "The court shall examine all errors that shall be assigned or found in any record brought from the present Supreme Court, or in any process or proceeding touching the same, or in any record of the Supreme Court organized by this act; and shall reverse or affirm any such judgment, or give such other judgment as the law may require."

The jurisdiction of the Court of Appeals seems under these provisions to remain as to writs of error from the new Supreme Court or other courts, the same as that of the Court of Errors under the constitution of 1821.

HOUGHTON v. STARR, 4 Wend. 175.

Dismissal of Writ of Error.

IN this case, the defendant brought a writ of error for several defects in the record. 1. The verdict was defective; the damages found by the jury exceeding the damages laid in the declaration. 2. The judgment was entered for the damages and costs only in an action of debt, thus giving damages and costs, where no debt was found. 3. The judgment was general against the defendant instead of special, by exempting him from imprisonment, after a plea of an insolvent discharge confessed by plaintiff; but

The Court of Errors dismissed the writ of error, with costs, on the ground that the party might have obtained relief in the court below, if he had sought it there :

And this, although it was shown that after the entry of the judgment, and before the suing out of the writ of error, the defendant below applied to the Supreme Court to set aside the proceedings of the plaintiff for irregularity ; but it did not appear that he had asked for a correction of the specific error, relied on for a reversal of the judgment.

THE PEOPLE, *ex rel.* DYCKMAN, *v.* THE TRUSTEES OF
BROOKLYN, 13 Wend. 130.

In S. Ct. 1 Wend. 318.

Dismissing Writ of Error.

THIS was an application on motion for a peremptory mandamus to the trustees of Brooklyn, to compel them to file a report of commissioners of assessment and estimate, and obtain a confirmation of the same, and to have the damages which had been awarded, duly assessed, &c.

The Supreme Court refused to issue the peremptory mandamus, as the relator did not show a complete, but only an inchoate right, and therefore, was not entitled to a mandamus ; that this writ will not be allowed, unless there is no other specific remedy, and the court, therefore, left the party to his remedy by action.

The relator brought a writ of error on this refusal of the Supreme Court to issue the peremptory mandamus. A motion was made on the part of the trustees, to dismiss it as irregularly and prematurely brought.

The Court of Errors accordingly dismissed the writ of error, holding, that a writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory mandamus, when application is made on motion : that it lies only for the relator, when judgment is pronounced after issue joined, upon plea or demurrer interposed upon the coming in of the return to the alternative mandamus ; and the writ of error was accordingly dismissed.

ADDENDA.

(The following reversals are contained in the 3d volume of Denio, not issued until too late to be incorporated in the body of this work.)

WAYDELL and others v. LUER, 3 Denio, 410.

In S. Ct. 5 Hill, 448.

ERROR to the Supreme Court. Luer, plaintiff in error, sued Cort, Waydell and Underhill, in the N. Y. C. P., in assumpsit. The defendants had been partners under the name of N. Cort, & Co., for a year, ending in January, 1838, when they dissolved, and made an assignment for the benefit of their creditors. The trustees not acting, Cort was left in possession of the partnership effects, and acted in the adjustment of its affairs. During the partnership, Luer lent the firm \$1,700, for which he took their note, payable 7th of February, 1838. When this note became due, which was after the dissolution, the plaintiff made an adjustment with Cort, of the amount due on the note, and took Cort's *own notes*, two for \$500 at nine months, and one for \$556 at 4 months, and as the witness who proved the transaction said *he believed*—some *other person's note*, and some money to the amount of over \$100; and the plaintiff then gave up to Cort the note of the firm, for the \$1,700 above mentioned. Cort was credited on the books of the firm, with the amount of the debt, as though paid by him individually. The notes of Cort, after several renewals and payments, were reduced to \$500, in August 1840, when Cort at Luer's instance, gave him a note signed with the name of the firm, payable 7th Feb. 1841, for the amount, which was produced at the trial. There was evidence tending to show that Waydell knew of Cort's notes having been taken for the original debt by the plaintiff.

Upon these facts, the defendants W. and U., Cort having

suffered judgment by default, requested the court to charge the jury that they must determine whether the plaintiff, after the dissolution of the firm, took Cort's own notes, the note of a third party, and a sum of money in *payment of* his debt, and gave up the partnership note; and if he did so, without any reservation of his claim on the other partners that his acceptance of the notes and money, was a discharge and release of the other partners Waydell, and Underhill. But the court, on the contrary, charged the jury that the settlement between Luer and Cort, could not operate to release them except so far as the notes of Cort were paid: that the jury must disregard the settlement, and that the plaintiff was entitled to go back to the original loan, and recover of all the partners the balance remaining unpaid. The jury found accordingly; and the court having confirmed the verdict, error was brought to the Supreme Court, where the judgment of the C. P. was affirmed. Error was then brought to this court.

A written opinion was delivered in favor of reversal by Senator Lott, who states the question as follows: "The material question in this case is, whether a partnership debt can be discharged by the negotiable note of one of the partners given after notice of the dissolution of the partnership, and received by the creditor as payment and in satisfaction." And he held that it was, under the circumstances of this case, and upon the weight of authorities in England and in this state, a complete discharge of the other partners. He maintains that the case of *Arnold v. Camp*, 12 Johns. 409, fully sustained that doctrine; and observes that it was cited in *Frisbie v. Larned*, 21 Wend. 450, by the very judge who in this case repudiated it. "Indeed," he says, "that case was universally acquiesced in in this state, until 1841, when it was first questioned in the case of *Cole v. Sackett*, 1 Hill, 516. I do not deem it necessary to refer to the opinion of judges in England on the point further than to say it was finally held in 1834, in *Thompson v. Percival*, 5 Barn. and Adolph. 925, that a partnership debt might, by agreement, be discharged by the acceptance of the sole liability of one of the partners only. He says:

"I am clearly of opinion that the doctrine of *nudum pactum* is not applicable to the present case."

Gardner, president, delivered an oral opinion in favor of reversal upon the grounds taken by Senator Lott.

Porter, senator, delivered a written opinion in favor of affirming the decision of the Supreme Court.

Talcott, senator, delivered an opinion in favor of reversal, but upon an entirely distinct ground from that taken by senator and the president, as to which he dissented, and held with the Supreme Court, that if the note of a third person had not formed a part of the consideration of the agreement or settlement, that the original liability of the whole firm, would, in that case, have remained unchanged." He says, p. 425 :

"The proposition which the defendant's counsel desired the court to affirm in its charge, *assumed* that there was evidence tending to show that the note of a third person was transferred by Cort to the plaintiff, on account of the co-partnership debt, upon the adjustment, when he gave his individual notes. There was some evidence to that effect. But the court refused to charge in the manner requested, and on the contrary instructed the jury to disregard the settlement, and that the plaintiff was entitled to go back to the original loan, and recover of all co-partners the balance unpaid. Under the testimony in this case, I think the jury would have been authorized to find that the note of a third party was delivered by Cort to the plaintiff, and that he agreed to accept that and the notes of Cort, and the money, "in settlement," or satisfaction of the partnership debt, and that their note was at the same time given up to be cancelled. If these facts had been so found by the jury, no recovery could have been had against the plaintiff in error.

The judge therefore should have charged as requested upon these points."

Johnson, senator, concurred with these views of Senator Talcott, in a written opinion in favor of reversal. Hand, senator, also concurred substantially with the opinion of Senator Talcott.

The judgment was *reversed*, by a vote of 12 for reversal, and 5 for affirmance.

It would seem clear that this reversal is to be placed on the ground of Senator Talcott, and the question whether such a "settlement," taking the note of one partner only, and delivering up the partnership notes is a discharge of the other partners, must be regarded as still unsettled.

NEVIN v. LADUE and another, overseers of the poor, &c., 3 Denio, 437—451.

ERROR from the Supreme Court. Ladue and Nelson as overseers of the poor of P. in Putnam county, sued Nevin before a justice of the peace in debt, for the penalty of \$25, for "selling strong or spirituous liquors in a less quantity than five gallons at a time, without having a license therefor, contrary to 1 R. S. 680, § 15." The return of the justice states that, "on the trial, the defendant being charged by the plaintiffs with the sale of ale, strong beer, or fermented beer, without a license therefor, confesses the charge in person, and claims it is not prohibited by statute." The justice rendered judgment for the plaintiffs, for the penalty, whereupon the defendant brought a *certiorari* to the C. P., which affirmed, and he then brought error to the Supreme Court.

Jewett, J. delivered the opinion of the court, who says :

"If ale or strong beer answers the description of strong or spirituous liquors, the action was well sustained. I am unable to entertain a doubt but that they come within the definition of *strong* or *spirituous* liquor. Both are intoxicating liquors. *Beer* is defined by Webster to be "a spirituous liquor made from farinaceous grain, &c." The manufacture of beer and its use as an intoxicating drink are of very high antiquity. Herodotus tells us that, owing to the want of wine the Egyptians drank fermented from barley. Lib. 2, ch. 77. That the legislature intended by the 15th section to prohibit the sale of all intoxicating liquors, I think is strongly indicated by the provision of the 29th section. It enacts that "No person shall be subject to be prosecuted by virtue of the provisions of this title, for selling metheglin, currant wine, cherry wine or cider." This operates as an

exception to the prohibition in the 15th section. It is urged, that "strong or spirituous," meant only such liquors as are produced by distillation. Why, if this were so, was it necessary to insert the 29th section, as neither of the kinds of liquor there specified are produced by distillation? Judgment affirmed.

From this judgment the defendant brought error to this court.

The CHANCELLOR delivered the decision of the court, in an opinion of fourteen pages, in which those curious in such researches will find a history of ale, beer, and wine from about the hour of Adam's expulsion from the garden of Eden, even unto this day. And not only of those but of all the other strong drinks in use, among nearly all the nations of the earth where such things have been invented. Nor is this all; he also gives us an amusing and edifying account of the anti-temperance habits of the Egyptian, Nubian, and Abyssinian monkeys, who make themselves beastly drunk upon a liquor known among those nations (not the monkeys) by the name of *bouza*; the monkey name we are sorry to say is not mentioned. This liquor, he informs us, however, is made by fermenting barley and other farinaceous grains with water, but without malting the grain; and that the monkeys are so fond of it, that it is sometimes used to catch them; from which, it would seem, that they have not yet arrived at any degree of perfection in manufacturing it themselves. This is perhaps fortunate, as the Chancellor states, that they, "like the bipeds they are apt to imitate, are inclined to partake of the pleasures of the inebriating cup, without duly considering the consequences. To effect his object, the monkey-catcher places a vessel filled with *bouza* at the foot of the tree on which the animals are gamboling, and then watches at a distance until they come down to regale themselves to intoxication. And we, who have seen the effects of similar proceedings elsewhere, can readily imagine what is the inevitable result of this stratagem to the *bouzy* monkeys."

After about thirteen pages upon this and similar histories, which will be found a perfect *encyclopædia* upon the subject of strong liquors, he comes to this conclusion.

“The term *strong waters*, as used in Cromwell's statute, and in the statute 26 Geo. 2, ch. 31, was entirely different in its meaning from the term *strong drink*, as used in King James's translation of the Bible, and from the term *strong liquor* as used in the colonial act of 1713, and other subsequent statutes, to denote any intoxicating beverage, produced either by fermentation or distillation. I have, therefore, no doubt that the revised statutes prohibited the selling by retail of ale and porter and every other kind of beer which was subject to the excise duty under the statutes in England, and under the colonial act of 1713. And if the plaintiff in error admitted that he had been guilty of such an offence, the judgment of the justice was right and properly affirmed by the Supreme Court.”

(As if our legislature before passing the act in question in the revised statutes, had studied all those histories and statutes referred to by the learned Chancellor, and legislated with a sole reference to all that heap of learning, instead of using the words in its *popular sense*, as they most unquestionably did, and in reference to which penal statutes are, above all, to be construed when it gives them a *stricter* construction! Whether the popular sense would enlarge or restrict their meaning in the present case, we have no opinion to offer.)

Upon that question the Chancellor holds that the admission of the defendant before the justice, that he had sold “ale, or strong beer, or fermented beer, without a license,” was only an admission that he had sold some *one* of the three. Upon this part of the case, he says. “But the term *fermented beer* in the connection in which it was used, might well have been understood by Nevin as intended to cover a charge of selling some of the various kinds of beer which have long been in use in this country under the different names of spruce beer, spring beer, ginger beer, molasses beer, &c. Each of these may very properly be termed fermented beer, as fermentation to a certain extent is necessary to fit them for use.” On this

ground alone the Chancellor declared he should vote for a reversal.

Barlow, Spencer and Wright, senators, delivered written opinions for reversal, in which they maintained that the question whether *ale* or *strong beer* were within the prohibitions of the excise laws did not arise in the case; it not being shown, as they construed the return, that the defendant had sold such liquors by retail.

The judgment must therefore be considered as reversed on that ground only, and the Chancellor's *dictum* of thirteen pages on the other point is clearly *obiter*, and of no authority as a judicial decision.

ARESON *v.* ARESON, 3 Denio, 458—472.

In S. Ct. 5 Hill, 410.

ERROR from the Supreme Court. The plaintiff claimed title as one of the heirs at law of Benjamin Areson, deceased, who died seized, in 1841, having shortly before his death made his will, containing the following clause; "Second, I give and bequeath unto my beloved wife Mary, all my real estate, one clock, and the interest of \$500 during her lifetime."

The remainder of the will contained sundry dispositions of *personal* estate, but no further notice of the testator's lands. The widow died in 1842, and unless she took a fee under the will the plaintiff was entitled to recover. The Supreme Court, Bronson, J., delivering the opinion, *held*, that the words "during her lifetime," were to be applied only to the last preceding antecedent: viz. "the interest of the \$500," and that therefore the widow took a fee in the lands, and the court gave judgment of nonsuit.

Bronson, J., says, 5 Hill, 412, "But still this is a question where no great light can be obtained from the books. The testator intended that the wife should have the 'interest of \$500 or, what is the same thing, \$35 a year, as long as she lived; and the words 'during her lifetime' were used to express that intention, and not to limit or qualify the devise

of real estate. This construction derives some aid from the fact that the real estate is no where else mentioned in the will. All the other clauses are confined, in terms, to the personal property.

"It is not without considerable hesitation that I have arrived at this conclusion; and it would not perhaps be too much to say, that this is one of the questions which sometimes arise upon wills, where the matter might about as well be decided one way as the other."

Upon writ of error to this court, Barlow Senator, Hard Senator, Johnson Senator, Spencer Senator, and Wright Senator, delivered opinions for reversal; holding that the wife took a life estate only in the premises; that the words, "during her lifetime," referred as well to the two antecedents, "all my real estate," and "one clock," as to the interest of the \$500.

Senators Porter and Van Schoonhoven maintained the conclusion adopted by Judge Bronson.

The judgment of the Supreme Court was *reversed* by a vote of 11 to 10.

AN APPENDIX to 3d Denio, p. 589, contains notes of cases decided in the Court of Appeals, at the terms held in November, 1847, and January, 1848, among which are the following cases of reversal.

1. CORNING and HORNER *v.* M'CULLOUGH. In S. Ct. 1 Denio 414. And FREELAND *v.* M'CULLOUGH, in which the same point was decided; viz:

"A suit to enforce the liability of a stockholder for the debt of a corporation, under a provision of its charter, is not barred by the three years limitation provided for actions upon statutes, "the benefit and suit whereof are limited to the party aggrieved," (2 R. S. 298, § 31,) but may be brought at any time within six years after the cause of action accrued."

2. JENKS v. SMITH, 3 Denio, 592. In S. Ct. 1 id. 580.

The Court of Appeals held in this case as follows: "Where a cause in a justice's court was tried in the town of D. and the defendants justified under a chattel mortgage, executed by R., whose residence was not shown, but which had been filed in the clerk's office of the town of D., the plaintiff claiming the property under a sale on execution by a constable of the town of D., and no objection having been made on the trial that the mortgage was not filed in the proper town; *held*, that the court of review should intend that it was assumed, on the trial before the justice, that the mortgagor resided in D., and that therefore the mortgage was filed in the proper office."

3. SPEAR v. WARDELL, 3 Denio, 607. In Ch. 1 Barbour R. 290.

The complainants, Spear and another, being judgment creditors of the defendants, sued out a warrant on the 5th of November, 1846, under the "act to abolish imprisonment, &c." The defendants after their arrest upon the warrant, but before any adjudication, made a general assignment of their property to a trustee for the benefit of all their creditors; the proceeds to be distributed rateably among them. The judge before whom they were brought, on the 28th, ordered them to be committed, when they presented an inventory of their estate, and an account of their creditors, and prayed that their property might be assigned, and they discharged according to the act. The judge ordered accordingly, and granted a discharge. The complainants thereupon, and without issuing execution on their judgment, filed a bill against their debtors and the assignee to reach

the property, and to have it applied in payment of their debt. An injunction having been issued against the assignee, he applied on motion to have it dissolved.

The Chancellor being of opinion that the complainants had not secured a right to a priority of payment, and that the assignment made pursuant to the application of the debtors, after the adjudication upon the warrant, to the assignee appointed by the judge, vested the property which passed by that assignment in him as a trustee for all the creditors of the assignors, rateably, and not for the benefit of the complainants exclusively, nor even for that portion of his creditors who were in a situation to sue out warrants against him, made an order dissolving the injunction, and denied the motion for a receiver.

The cause having been argued in the Court of Appeals, that court held that by the true construction of the provisions of the act under consideration, the complainants, in consequence of their proceedings, had acquired a right to priority of payment out of the assets of the debtors, and that the voluntary assignment made before the adjudication to commit, was a fraud upon that statute, and *reversed* the order of the Chancellor which had been appealed from.

GRACIE v. FREELAND, 3 Denio, 609.

In this case, upon an appeal from an interlocutory order in equity, made at a *special* term of the New Supreme Court, coming on to be heard, it was objected that an appeal would not lie directly from such an order to the Court of Appeals; but that the party must apply for a rehearing at a general term, pursuant to the 12th section of the judiciary act of 1847.

The Court of Appeals, after time taken for consideration, held that no appeal could be taken to this court from an order or decree in equity, made at a special term of the Supreme Court, and thereupon the appeal was dismissed.

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